

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1852.

No. 381.

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— AND JOHN GEORGE SCHMIDT, CHARLES M.  
GRANGER, H. MOSKOW, ET AL., PLAINTIFFS  
vs.  
THE BANK OF COMMERCIAL.

— IN THE DISTRICT COURT OF THE TERRITORY OF NEW  
MEXICO.

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— OCTOBER 17, 1852.

(23,250)

(23,259)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 281.

SCHMIDT AND STORY, FRANZ SCHMIDT, CHARLES M. STORY, CHARLES M. CROSSMAN, ET AL., PLAINTIFFS IN ERROR,

vs.

THE BANK OF COMMERCE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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**a THE UNITED STATES OF AMERICA, ss:**

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a ple- which is in the Supreme Court before you, wherein Schmidt & Story, Franz Schmidt, Charles M. Story, Charles M. Crossman, Edward W. Brown, William R. Pratt and Henry Evans, et als. were appellants and H. Newman, Aug. Winkler, A. F. Katsenstein, Julius Campredon, Jacobo Sedillo, P. N. Younker, Abram Abeyta, F. Fisher, W. H. Liles, J. J. Leeson, Lew Gatlin, Chas. Lewis, and Morris Lowenstein were sureties on the supersedeas Bond to supersede said Judgment, and The Bank of Commerce was appellee, a manifest error hath happened, to the great damage of the said appellants and their sureties on the supersedeas bond, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause, further to be done therein, to correct that error, what of right, and according to the law and custom of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico, this the 2nd day of January, 1912.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,  
*Clerk Supreme Court of New Mexico.*

**b THE UNITED STATES OF AMERICA, ss:**

To the Bank of Commerce, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, wherein Schmidt & Story, et al., were appellants and you were appellees to show cause, if any there be, why the judgment rendered against the said appellants, as by the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico, this the 2nd day of January 1912.

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM H. POPE,  
*Chief Justice Supreme Court of New Mexico.*

Due personal service of the foregoing citation is admitted this 28 day of February, 1912.

JAMES G. FITCH,  
H. M. DOUGHERTY,

*Attorneys for the Bank of Commerce, Defendant in Error.*

c STATE OF NEW MEXICO,  
*Supreme Court, ss:*

I, Jose D. Sena, Clerk of the Supreme Court of New Mexico do hereby make return to the within writ of error, by transmitting to the Supreme Court of the United States, a true copy of the record and proceedings in the cause therein mentioned, under my hand and the seal of the Supreme Court of the State of New Mexico.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,  
*Clerk Supreme Court of New Mexico.*

1 Be it remembered, That heretofore, on towit on the twenty-third day of October, A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a Transcript of record, in a certain cause therein pending, entitled The Bank of Commerce, appellee, vs. Jasper N. Broyles, et als., Appellants, which said transcript of record in the above entitled cause No. 1248, was and is in the following words and figures towit:—

THE BANK OF COMMERCE  
vs.  
JASPER N. BROYLES et als.

Be it remembered, That heretofore, to-wit, on the 21st day of April, A. D. 1908, there was filed in the office of the Clerk of the District Court of the Third Judicial District of the Territory of New Mexico, in and for the County of Socorro in said district, a complaint in the words and figures, as follows, to-wit:

In the District Court of the Third Judicial District of the Territory  
of New Mexico, within and for the County of Socorro.

No. 5244.

THE BANK OF COMMERCE, Plaintiff,  
vs.

JASPER N. BROYLES, SCHMIDT & STORY, FRANZ SCHMIDT, CHARLES  
H. Story, Charles M. Crossman, Edward W. Brown, William E.  
Pratt, Charles Lewis, and Henry Evans, Defendants.

*Complaint.*

Plaintiff alleges that it is a corporation duly organized, existing and doing business under the laws of the Territory of New Mexico, with its principal place of business in the City of Albuquerque, New Mexico; that the defendant, Schmidt & Story, is a co-partnership composed of Franz Schmidt and Charles H. Story and doing business in Socorro County; that all of the other above named defendants are residents of said Socorro County, New Mexico, and for cause of action plaintiff shows:

I.

That all of said defendants are indebted to plaintiff on a promissory note of which the following is a copy:

"\$10,000.00. ALBUQUERQUE, NEW MEXICO, April 9th, 1908.

On demand after date (without grace) we jointly and severally promise to pay to the order of the Bank of Commerce, at the office of said Bank, in Albuquerque, New Mexico, Ten Thousand & 3 no-100 Dollars with interest at the rate of ten per cent per annum from date until paid. Principal and interest payable in United States gold coin, for value received, and if the same shall not be paid when due, we jointly and severally agree to pay all costs of collection, including reasonable attorney's fees, if suit be brought on this note, or if attorneys are employed to collect the same.

G. P. ANDERSON.  
CHAS. LEWIS.  
H. EVANS.  
J. N. BROYLES.  
FRANZ SCHMIDT & STORY.  
CHAS. M. CROSSMAN.  
E. W. BROWN.

No. 13776. Due —."

There are no credits nor indorsements upon said note and there is due and owing plaintiff from said defendants thereon the sum of Ten Thousand Dollars, which plaintiff claims, with interest at 10% per

annum from April 9th, A. D. 1908, and an additional 10% upon the whole amount due thereon as attorney's fees.

The defendant, Jasper N. Broyles is the same person who signed said note as J. N. Broyles; the said co-partnership of Schmidt & Story signed said note as Franz Schmidt & Story, intending thereby to obligate and in truth and in fact did obligate the said co-partnership of Schmidt & Story as one of the makers of said note; the said defendant, Charles M. Crossman, is the same person who signed said note as Chas. M. Crossman; the said defendant Edward W. Brown is the same person who signed said note as E. W. Brown; the defendant William E. Pratt is the same person who signed said note as G. P. Anderson, the said G. P. Anderson being the name by which the said William E. Pratt is generally known; the said defendant Charles Lewis is the same person who signed said note as Chas. Lewis; and the said defendant Henry Evans is the same person who signed said note as H. Evans.

## II.

Each and all of the above named defendants are further indebted to plaintiff on another promissory note, of which the following is a copy:

4      "5,000.00.      ALBUQUERQUE, NEW MEXICO, April 9th, 1908.

On demand after date (without grace) we jointly and severally promise to pay to the order of The Bank of Commerce, at the office of said Bank, in Albuquerque, New Mexico, Five Thousand & no-100 Dollars, with interest at the rate of ten per cent per annum from date until paid. Principals and interest payable in United States gold coin, for value received, and if the same shall not be paid when due, we jointly and severally agree to pay all costs of collection, including reasonable attorney's fees, if suit be brought on this note, or if attorneys are employed to collect the same.

G. P. ANDERSON.

CHAS. LEWIS.

H. EVANS.

J. N. BROYLES.

FRANZ SCHMIDT & STORY.

CHAS. M. CROSSMAN.

E. W. BROWN.

No. 3778. Due —."

The following is the only credit and indorsement upon said note: "April 16, 1908 Paid \$1,500—," and there is due and owing plaintiff from said defendants thereon the sum of Three Thousand Five Hundred and Nine and 60-100 Dollars, which plaintiff claims, with interest at 10% per annum from April 16th, A. D. 1908 and an additional 10% upon the whole amount due thereon as attorney's fees.

The defendant, Jasper N. Broyles is the same person who signed said note as J. N. Broyles; the said co-partnership of Schmidt & Story signed said note as Franz Schmidt & Story, intending thereby to obligate and in truth and in fact did obligate said co-partnership of

Schmidt & Story as one of the makers of said note; the said defendant, Charles M. Crossman is the same person who signed said note as Chas. M. Crossman; the said defendant, Edward W. Brown is the same person who signed said note as E. W. Brown; the defendant William E. Pratt is the same person who signed said note as G. P. Anderson, the said G. P. Anderson being the name by which the said William E. Pratt is generally known; the said defendant, Charles Lewis is the same person who signed said note as Chas. Lewis; and the said defendant Henry Evans is the same person who signed said note as H. Evans.

5 Wherefore the plaintiff, The Bank of Commerce, asks judgment against said defendants, Jasper N. Broyles, Schmidt & Story, Franz Schmidt, Charles H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt, Charles Lewis and Henry Evans, in the sum of Thirteen Thousand Five Hundred and Nine & 60-100 Dollars with interest at 10% per annum from the 9th day of April, A. D. 1908, upon Ten Thousand Dollars of that amount and at the same rate upon three Thousand Five hundred and nine & 60-100 Dollars from the 16th day of April, A. D. 1908, for an additional 10% upon the whole amount due as aforesaid as attorney's fees and for costs of suit.

THE BANK OF COMMERCE, Plaintiff.

DOUGHERTY & GRIFFITH,  
Socorro, N. M., Att'ys for Plaintiff.

TERRITORY OF NEW MEXICO,  
County of Socorro.

John E. Griffith, being first duly sworn according to law, deposes and says that he is one of the attorneys for The Bank of Commerce, the plaintiff in the above entitled cause; that said plaintiff is a corporation and has no place of business in said Socorro County, New Mexico; that none of the officers of said plaintiff reside in or are to be found in said County; that he has read the foregoing complaint and knows the contents thereof; and that all the allegations of said complaint are true of his own knowledge, except those matters stated to be upon information and belief and as to those matters he believes them to be true.

JOHN E. GRIFFITH.

Subscribed and sworn to before me this 21st day of Apr. A. D. 1908.

[Seal District Court.]

WILLIAM W. MARTIN, Clerk.  
By WM. D. NEWCOMB, D'pty.

6 And which said complaint bears the following endorsement, to-wit: No. 5244. Territory of New Mexico, County of Socorro. In the District Court, Third Judicial District. The Bank of Commerce vs. Jasper N. Broyles, et als. Complaint. Third Judicial District Court, County of Socorro. Filed in my Office

April 28, 1908. William E. Martin, Clerk, by Wm. D. Newcomb, Deputy, Dougherty & Griffith, Socorro, New Mexico, Attorneys for Plaintiff.

And be it remembered that thereafter, to wit: on the 7th day of May, A. D. 1908, there was filed in the office of the Clerk of the Third Judicial District Court in and for the County of Socorro, New Mexico, the following answer, which in words and figures, is as follows, to wit:

In the District Court of the Third Judicial District of the Territory of New Mexico within and for the County of Socorro,

No. 5244. Civil.

THE BANK OF COMMERCE, Plaintiff,

versus

JASPER N. BROYLES, SCHMIDT & STORY, FRANZ SCHMIDT, CHARLES H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt, Charles Lewis, and Henry Evans, Defendants.

Come now Schmidt & Story, Franz Schmidt, Charles H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt  
7 Charles Lewis and Henry Evans, defendants in the above entitled cause, by Albert B. Fall and Holt & Sutherland, their attorneys, and answering plaintiff's complaint herein, say:

(1) They admit that plaintiff is a corporation duly organized, existing and doing business under the laws of the Territory of New Mexico, with its principal place of business in the City of Albuquerque, New Mexico; that defendant Schmidt & Story is a co-partnership composed of Franz Schmidt and Charles H. Story, and doing business in Socorro County, New Mexico in and under the firm name of Schmidt & Story, and that the defendants hereinabove named are residents of the said county of Socorro.

(2) They deny that they or any one of them is indebted to the plaintiff on the promissory notes, copies of which are set forth in paragraphs numbered one and two of plaintiff's complaint herein; they aver that they have no knowledge or information sufficient to form a belief, and therefore deny that there are no credits or endorsements upon said notes except as set forth in plaintiff's said complaint; they deny that there is due or owing to plaintiff from them or any one of them on said promissory notes any sum of money whatsoever or any part of portion of the sums of money alleged by plaintiff to be due and owing to it upon said promissory notes or either thereof.

And for a further and first separate defense to the causes of action set forth in plaintiff's said complaint, defendants hereinabove named say:

(1) That said notes were executed to plaintiff to cover an antecedent and pre-existing debt due from defendant J. N. Broyles to plaintiff, which indebtedness was incurred and accrued prior to the

time these defendants affixed their signatures to said notes; that these defendants at no time received any consideration whatsoever for the execution of said notes; that plaintiff did not become, and is not, the holder of said notes in due course, in this: that prior to the time when these defendants affixed their signatures to said notes, defendant J. N. Broyles was indebted to plaintiff in the full amount of said notes, and that defendants executed said notes as accommodation makers for said defendant Broyles to cover the amount of such prior indebtedness; that these defendants' signatures to said notes were obtained by virtue of certain false and fraudulent representations made to these defendants by the said Broyles and

plaintiff in substance and to the effect that defendant Broyles was solvent and amply able to pay off and discharge all his just debts and liabilities; that defendants' signatures to said notes were desired by defendant Broyles and plaintiff merely and purely as accommodation makers in order to enable plaintiff to make a proper showing before its board of directors and the Territorial Bank Examiner in case he should visit said bank for the purpose of making an official examination; that said notes were amply secured by collateral deposited by defendant Broyles with plaintiff bank; that defendant Broyles could and would take care of said notes and defendant would never hear of it again; that plaintiff knew defendant Broyles to be financially sound and proposed to and would carry him as long as he desired them so to do or as might be necessary; that at the time when defendants' signatures were so as aforesaid obtained the time when said notes were to be payable was in blank and these defendants were further falsely and fraudulently informed by defendant Broyles and plaintiff in substance and to the effect that defendant Broyles was to be given such time within which to pay the indebtedness evidenced by said notes as he might require and were left in ignorance of the intention to make said notes payable on demand as appears from the copies thereof set forth in plaintiff's said complaint; that defendant Broyles, in the presence and hearing of an official, and as defendants are informed and believe a duly authorized representative of plaintiff bank, further informed defendants in substance and to the effect that defendant Broyles had been requested by plaintiff to obtain defendants' signatures to said notes for the purpose and with the understanding aforesaid; that thereupon and immediately thereafter said notes were delivered by defendant Broyles to plaintiff, but that same were not taken by plaintiff in good faith, and that at the time they were taken by plaintiff, it had actual knowledge and notice of the aforesaid false and fraudulent representations and of the fraudulent manner in which these defendants' signatures had been obtained as aforesaid, and of the fact that defendant Broyles in filling in said notes so as to make them payable on demand had been and was guilty of a breach of faith with these defendants.

And for a further and second separate defense to the causes  
9 of action set forth in plaintiff's complaint, defendants hereinbefore named say:

Upon information and belief, that there was a total absence and failure of consideration for said notes; that plaintiff did not take

same in good faith and for value; that plaintiff is not the holder of said notes in due course, in that the signatures of these defendants were obtained thereto by the defendant. J. N. Broyles, acting as agent for and in behalf and at the request of plaintiff and with its knowledge, by falsely and fraudulently pretending and representing to defendants in substance and effect that defendant Broyles was solvent and amply able to pay off and discharge all his just debts and liabilities; that the signatures of these defendants to said notes were desired merely as accommodation makers in order to enable plaintiff bank to make a proper showing before its board of directors and the Territorial Bank Examiner in case he should visit said bank for the purpose of making an official examination; that said notes were amply secured by collateral deposited by defendant Broyles with plaintiff; that defendant Broyles could and would take care of said notes and that defendants would never hear of them again or be called upon to pay them or any part thereof; that plaintiff proposed to and would carry said Broyles as long as he desired them so to do or as might be necessary; that when defendants signed said notes the time when same should be payable was blank and was thereafter so filled in by defendant Broyles as to make said notes payable on demand; that plaintiff had actual knowledge of the false and fraudulent representations aforesaid.

Wherefore, defendants demand judgment that they be hence dismissed with costs of suit.

ALBERT B. FALL,

*El Paso, Texas.*

HOLT & SUTHERLAND,

*Las Cruces, New Mexico.*

Attorneys for defendants, Schmidt & Story, Franz Schmidt, Charles H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt, Charles Lewis and Henry Evans.

10 TERRITORY OF NEW MEXICO,  
*County of Socorro, ss:*

Franz Schmidt, being first duly sworn, deposes and says that he is one of the defendants in the above entitled action, that he has read the foregoing answer and understand the contents thereof, that the matters and things therein stated are true of his own knowledge, except as to those matters stated on information and belief, as those matters he believes them to be true.

FRANZ SCHMIDT.

Subscribed and sworn to before me this 7th day of May, 1908.

*Notary Public, Socorro Co., N. M.*

And which said Answer bears the following endorsement, to-wit: No. 5244. Civil. District Court, Socorro County. Bank of Commerce, Plaintiff, vs. Jasper N. Broyles, et al., Defendants. Answer.

Third Judicial District Court, County of Socorro. Filed in my Office May 7, 1908, William E. Martin, Clerk, by Wm. D. Newcomb, Deputy.

And be it remembered that thereafter, to-wit, on the 20th day of May, A. D. 1908, there was filed in the office of the Clerk of the Third Judicial District Court, in and for the County of Socorro, Territory of New Mexico, a reply of Plaintiff, which in words and figures is as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, within and for the County of Socorro.

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No. 5244.

THE BANK OF COMMERCE, Plaintiff,  
vs.

JASPER N. BROYLES, SCHMIDT & STORY, FRANZ SCHM-DT, CHARLES H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt, Charles Lewis, and Henry Evans, Defendants.

*Reply of Plaintiff.*

And now comes the plaintiff and for reply to the new matter set forth in defendants' answer plaintiff says:

I.

To the first defense: Plaintiff denies that the said defendants did not receive any consideration whatsoever for the execution of the said promissory notes, but alleges the contrary and shows the fact to be, that the said notes were given in consideration of the cancellation of previous notes of the said defendant, Jasper N. Broyles, and of the said defendants, George P. Anderson, Henry Evans and Edward W. Brown, and that the same was an ample and sufficient consideration to the defendants, and each and all of them; plaintiff denies that it is not the holder of said notes in due course, but asserts to the contrary, that it is the holder in due course; and avers that it has no knowledge or information sufficient to form the belief and therefore denies that the said defendants to said notes, or any of them were executed by them as accommodation makers for the defendant Broyles; and denies that the signatures to said notes or any of them were obtained by false and fraudulent representations made to said defendants by the plaintiff herein, in the manner and form or in substance and to the effect as set forth by defendants in their answer, and denies that it made any representations whatsoever to the said defendants or any of them, at the time of or before the signing of the said notes, and denies that it made any representations whatsoever to the defendant, or any of them, about the time within which the said notes were to be paid or the notes were payable; denies that the defendant Broyles in the presence

and hearing of an official or of a duly authorized representative of plaintiff informed defendants in substance and effect that defendant Broyles had been requested by plaintiff to obtain defendants signatures to said notes for the purpose and with the understanding as stated in defendants' answer; and further plaintiff says that it has no knowledge or information sufficient to warrant a belief and therefore denies that the defendant Broyles made the representations, or any of them as charged by defendants, or that the representations were material, and further shows that the defendant Broyles was not the agent of plaintiff and that the plaintiff had no knowledge whatsoever of any representations made by the said defendant Broyles, if any he made, and is not bound thereby; and plaintiff denies that the said notes were not taken in good faith and denies that at the time said notes were taken it had actual knowledge and notice of any false and fraudulent representations and with the fraudulent manner in which the defendants' signatures had been obtained, and if any there were, and the fact that the defendant Broyles filled in the time when said notes were payable, if in fact he did fill in said date, which plaintiff denies, to make them payable on demand and denies that plaintiff is guilty of a breach of faith with said defendants.

And plaintiff expressly denies each and every other allegation contained in said reply which has not been herein specifically denied or answered.

## II.

To the second defense contained in defendants' answer: Plaintiff denies that there was a total absence of consideration in said notes; denies that plaintiff did not take the same in good faith and for value; denies that plaintiff is not the holder of said notes in due course and denies that the defendant, J. N. Broyles acting as agent for and in behalf and at the request of plaintiff and with its knowledge by falsely and fraudulently pretending and representing to defendants in substance and effect that the defendant Broyles was Solvent and amply able to pay off all his just debts and liabilities; that the signatures of the defendants to said notes were desired merely as accommodation makers in order to enable plaintiff to make a proper showing before its Board of Directors and Territorial Bank Examiner in case he should visit said Bank for making an official examination; that said notes were amply secured by collateral deposited by defendant Broyles with plaintiff, that defendant Broyles could and would take care of said notes and that the said defendants — never hear of it again or to be called upon to pay said notes or any part thereof that plaintiff proposed to and would carry Broyles as long as he desired so to do or as might be necessary and denies that the said defendant Broyles was acting as agent for the plaintiff with its knowledge, and upon information and belief; denies that the defendant Broyles made any of the representations as charged by defendants and denies that the alleged representations are material; and denies that the plaintiff is in any way bound by any representations made by Broyles, if any he made; and denies, upon information and belief, that when

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the defendants signed said notes the time when same should be payable was blank; denies that the act of the filling of the said notes, if he did so fill in said notes as to the time payable, is in any ways binding upon this plaintiff; and denies that it had actual knowledge of any false and fraudulent representations, and denies that any was made by it or any person authorized to act for it.

And plaintiff expressly denies each and every other allegation contained in the said reply which has not been herein specifically denied or answered.

THE BANK OF COMMERCE.  
By W. S. STRICKLER,

*Plaintiff.*

DAUGHERTY & GRIFFITH,  
*Socorro, N. M., Att'ys for Plaintiff.*

TERRITORY OF NEW MEXICO,  
*County of Socorro, ss:*

W. S. Strickler, being first duly sworn according to law, deposes and says that he is Vice-President of The Bank of Commerce, a New Mexico corporation; that he has read the foregoing reply and knows the contents thereof, that the matters and things therein stated are true of his own knowledge, except those matters stated to be upon information and belief, and as to those matters he believes them to be true.

W. S. STRICKLER.

14 Subscribed and sworn to before me this 19th day of May,  
A. D. 1908.

[Seal E. M. Merritt, Notary Public, Bernalillo County, N. M.]

B. M. MERRITT,  
*Notary Public.*

And which said Reply of Plaintiff bears the following endorsement, to-wit: No. 5244. Territory of New Mexico, County of Socorro. In the District Court, Third Judicial District. The Bank of Commerce vs. J. N. Broyles et als. Reply of Plaintiff. Filed in my office this 20 day of May, 1908. William E. Martin, Clerk, by Wm. D. Newcomb, Deputy. Dougherty & Griffith, Socorro, New Mexico, Attorneys for Plaintiff.

No. 5244.

THE BANK OF COMMERCE  
vs.  
JASPAR N. BROYLES.

15 Comes the plaintiff by Dougherty & Griffith and James G. Fitch, Esq., their attorneys, and come the defendants by Fall, Holt & Sutherland, their attorneys, and all parties announcing them-

selves ready for trial and issue being joined, there comes the following jury, to-wit:

Luciano Griego, Jose E. Pino y G., Gabino Pacheco, Jose Montiel, Florentino Montoya, Serafin Lucero, J. D. Carrillo, Antonio Masearnas, Juan Trujillo, John McIntyre, Lorenzo Pdilla, Juan Peralta, Twelve good and lawful men taken from the body of the County of Socorro in the Territory of New Mexico, duly selected, drawn, accepted, empaneled and sworn to well and truly try the issues joined in this cause pending wherein the Bank of Commerce is plaintiff and Jasper N. Broyles, et al., are defendants, and a true verdict render according to the law and evidence submitted.

The jury now having heard only a part of the evidence, and the trial of this case not being concluded, are allowed to retire until the incoming of the Court tomorrow morning at nine o'clock, in charge of Juan Torres and Samuel C. Meeks two duly sworn bailiffs of this court.

It is ordered that court do now adjourn until tomorrow morning at nine o'clock.

And thereafter, on the twenty-fifth day of the said term, it being the 30th day of June, A. D. 1908, the following proceedings among others were had, to-wit:

No. 5244.

THE BANK OF COMMERCE  
vs.  
JASPER N. BROYLES et al.

Comes the plaintiff by Dougherty & Griffith and James G. Fitch, Esqs., its attorneys, and comes the defendants by Fall, Holt & Southland their council and comes the jury heretofore empaneled and the trial of this cause is resumed; the jury having heard only a portion of the evidence and the trial of this cause not being concluded, the jury is allowed to separate by consent of all parties hereto until the incoming of court tomorrow morning at nine o'clock.

And thereafter, on the twenty-sixth day of the said term, it being the 1st day of July, A. D. 1908, the following proceedings among others were had, to-wit:

16

No. 5244.

THE BANK OF COMMERCE  
vs.  
JASPER N. BROYLES et al.

Comes the plaintiff by Dougherty & Griffith and James G. Fitch, Esqs., its attorneys, and come the defendants by Fall, Holt & Southland, their counsel, and comes the jury heretofore empaneled, and the trial of this cause is resumed; the jury having heard only a

portion of the evidence and the trial of this cause not being concluded, the jury is allowed to separate by consent of all parties hereto until the incoming of court tomorrow morning at nine o'clock.

And thereafter on the twenty-seventh day of the said term, it being the 2nd day of July, A. D. 1908, the following proceedings among others were had, to-wit:

No. 5244.

THE BANK OF COMMERCE  
vs.  
JASPER N. BROYLES et al.

Comes the plaintiff by Dougherty & Griffith and James G. Fitch, Esqs., its attorneys, and comes the defendant- by Fall, Holt & Sutherland, their counsel, and comes the jury heretofore empaneled and the trial of this cause is resumed; the jury having heard only a portion of the evidence and the trial of this cause not being concluded, the jury is allowed to separate by consent of all parties hereto until the incoming of Court tomorrow morning at nine o'clock.

And thereafter, on the twenty-eighth day of the said term, it being the 3rd day of July, A. D. 1908, the following proceedings among others were had, to-wit:

No. 5244.

THE BANK OF COMMERCE  
vs.  
JASPER N. BROYLES et al.

Comes the plaintiff by Dougherty & Griffith and James G. Fitch, Esqs., its attorneys, and comes the defendant- by Fall, Holt & Sutherland their counsel, and all the evidence being heard the  
17 plaintiff moves the Court to instruct the jury to return a verdict for the plaintiff and the defendants move the Court to return a verdict for the defendants, except J. N. Broyles; and the said motion of defendants is denied and the motion of the plaintiffs is sustained as to all of said defendants except Charles Lewis, and is denied as to said Lewis. Whereupon, plaintiff says that it will not further prosecute this suit against the said Charles Lewis and elects to enter a non-suit as against said Lewis, whereupon, it is ordered by the Court that this cause be and the same hereby is dismissed as to the said Charles Lewis, to all of which orders and rulings of the court the said defendants except; and comes the jury heretofore empaneled herein and by instruction of the Court return the following verdict, to-wit:

"No. 5244.

THE BANK OF COMMERCE  
vs.  
JASPER N. BROYLES et al.

We the Jury under the instruction of the Court do find the issue in this cause for the plaintiff and against the defendants Jasper N. Broyles, Schmidt and Storey, Franz Schmidt; Charles H. Storey, Edward W. Brown, William E. Pratt, Charles M. Crossman and Henry Evans and do assess plaintiff's damages at Fifteen thousand and one hundred ninety-five and fifty-eight one-hundredths Dollars.

JOHN MCINTYRE, *Foreman.*"

Whereupon, it is ordered by the Court that said verdict be filed in open Court, and that the jury be discharged from the further consideration of this cause.

And now the defendants herein, with the exception of J. N. Broyles give notice of motion for a new trial herein, and by consent of parties it is ordered by the Court that said motion be considered filed and that when said motion is filed it shall be filed by the Clerk of this Court as of this date.

It is therefore considered, ordered and adjudged by the Court that said motion for a new trial herein, be and the same is hereby overruled; to which ruling of the Court said defendants except. Wherefore,

18 It is considered by the Court that the plaintiff, The Bank of Commerce do have and recover of and from the defendants Jasper N. Broyles, Schmidt and Storey, Franz Schmidt, Charles H. Storey, Charles M. Crossman, Edward W. Brown, William E. Pratt and Henry Evans the sum of Fifteen Thousand One Hundred ninety-five and 58-100 Dollars with interest thereon at the rate of ten per cent per annum from this date until paid, together with its costs herein to be taxed by the Clerk of this Court; and that execution issue therefor.

And now said defendants pray and appeal from the judgment herein to the Supreme Court of the Territory of New Mexico, which appeal is granted.

It is therefore considered, ordered and adjudged by the Court that said defendants be and they are hereby granted an appeal from the judgment herein to the Supreme Court of the Territory of New Mexico, and that execution herein be and the same is hereby stayed upon the filing by said defendants of a good and sufficient bond conditioned in the usual form in accordance with the statute in such cases made and provided.

In the District Court of the Third Judicial District of the Territory of New Mexico within and for the County of Socorro.

No. —.

THE BANK OF COMMERCE, Plaintiff,  
vs.

JASPER N. BROYLES, SCHMIDT & STORY, FRANZ SCHMIDT, CHARLES H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt, Charles Lewis, and Henry Evans, Defendants.

Comes now the defendants, Schmidt & Story, Franz Schmidt, Charles H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt and Henry Evans, by A. E. Fall and Holt & Sutherland, their attorneys, and move the court to vacate and set aside the verdict of the jury heretofore rendered herein and to grant defendants a new trial in this cause for the following reasons which materially affect their substantial rights; to-wit:

1. Because said verdict is contrary to law.
- 19      2. Because said verdict is contrary to the evidence.
3. Because said verdict is contrary to the weight and preponderance of the evidence.
4. Because the amount of damages assessed in said verdict is excessive and was not warranted by the evidence.
5. Because the evidence did not sustain the verdict and said verdict was contrary to the law and the evidence of the case.
6. Because said verdict was not warranted or sustained by the pleadings in the case.
7. Because under the law and the evidence the defendants were entitled to a verdict under instruction of the court.
8. Because the court erred in sustaining plaintiff's motion to instruct the jury to find for the plaintiff against all of the defendants, except defendant Charles Lewis.
9. Because the court erred in overruling defendants' motion to instruct the jury to return a verdict for defendants upon the ground that several of the defendants signed the notes sued on with the understanding from plaintiff that said notes were to run from four to six months, whereas said notes were filled in so as to read payable on demand; and upon the further ground that said notes could not be recovered upon unless filled out in accordance with instructions of the makers.
10. Because the court erred in permitting plaintiff to take a non-suit as to defendant Charles Lewis, after the court had ruled that as to defendant Lewis the case must go to the jury.
11. Because the Court erred in refusing to permit said case to go to the jury as to said defendant Lewis, and in denying said defendant the right to a verdict at the hands of the jury.
12. Because the court erred in refusing to instruct the jury to return a verdict for all defendants upon the ground that the taking of a non-suit by plaintiff as to the defendant Lewis operated as an election upon the part of plaintiff to discharge said defendant from

his obligation upon the notes sued upon, wherefore the co-defendants of the said Lewis were discharged in law.

13. Because the court erred in refusing to instruct the jury that in the rendition of their verdict under the instructions of the court they should credit defendants upon the notes sued upon not only as to the \$1,500.00 payment admitted by plaintiff, but also as to the entire amount of the note of the Golden Bell Mining Company upon which the record showed plaintiff had obtained judgment for \$5,938.47, and as to which the record further showed plaintiff to have acknowledged satisfaction; that the court likewise erred in refusing to instruct the jury to further give defendants credit for the sums of \$35.00, \$107.25, \$11.97 and \$3.03 also shown by the record to have been paid to the plaintiff to and for the use and benefit of defendants.

14. Because the court erred in refusing to sustain defendants' motion to instruct the jury that plaintiff had no right to apply the \$9,997 shown by the evidence to have been credited by plaintiff upon a certain account of the defendant Broyles, to such account exclusive of the note sued upon, and to further instruct the jury that they should give credit to the defendants for all such amount; that is to say, for said sum of \$9,997, or such proportionate amount thereof as the \$10,000 overdraft shown by the evidence bore to the total sum of \$25,000 evidenced by promissory notes.

15. Because the court erred in denying defendants' motion to instruct the jury to return a verdict for defendants, upon the ground that it appeared from the evidence and record in the case that there was collateral held by the plaintiff bank for the notes sued upon, and that the plaintiff bank knew that the defendants were simply accommodation makers.

16. Because the court erred in denying defendants' motion to instruct the jury to return a verdict for the defendants upon the ground that no demand was proven, and upon the ground that the record disclosed that no demand was made by plaintiff upon the defendants for the payment of the notes sued on, and that no opportunity was offered to defendants to pay off the notes sued on and acquire the collateral shown by the record to have been deposited to secure the payment of same.

17. Because the court erred in holding that there was insufficient evidence upon which defendants could go to the jury with reference to the understanding between the plaintiff and the makers of the notes sued upon as to time when said notes were to be made payable, and in instructing the jury that such defense had not been made out or established by the testimony and in instructing the jury that plaintiff had a right to fill out the notes sued upon so as to make same read payable on demand.

18. Because the court erred in holding that there was insufficient evidence upon which defendants, with the exception of Lewis, could go to the jury upon the question of alleged fraudulent representations by plaintiff whereby defendants were induced to sign the notes sued on.

19. Because no demand having been proven the court had no jurisdiction to instruct the jury to return a verdict for plaintiff.

20. Because there was sufficient testimony to entitle defendants to go to the jury upon the question of the time the notes sued upon were to run.

21. Because testimony in the case disclosed that no demand was made for the payment of the notes sued on; that said notes were dated April 9th, 1908, and suit was brought upon same on April 21st, 1908, without previous notice to or demand upon defendants or any of them for the payment of said notes, under which state of facts defendants were entitled to go to the jury upon the question of reasonable time.

22. Because false and fraudulent representations made to the defendant Lewis whereby he was induced to sign the notes were sufficient in law to vitiate the notes and discharge all other makers from liability.

23. Because by virtue of signatures of makers being obtained by false representations the notes were absolutely void and the fact that some of the makers had previously signed another note was no bar to the interposition by them of such defense, and upon the issue of false representations defendants were entitled to go to the jury.

24. Because the court erred in excluding testimony material and competent under the issues in said cause.

25. Because the court erred in excluding portions of testimony offered by defendants as to conversations between defendants and plaintiff's authorized agent, for the reason that the court having admitted and held to be competent a part of defendants' testimony as to such conversations, defendants were entitled to prove the whole of such conversations as a part of the res gestae of the transaction leading up to the signing of the notes sued on.

26. Because there was positive and direct testimony introduced by defendants showing that at the time said notes were signed the statement was made by Mr. Johnson, Assistant Cashier of plaintiff bank, that same were to run or be made payable six months after date, and that such was the understanding; wherefore, it appearing that the notes sued upon were made out payable on demand, same were void, and if void as to one maker they were void as to all, and in any event upon this issue defendants were entitled to go to the jury.

27. Because plaintiff by the stipulation entered into during the progress of the trial having acknowledged satisfaction of judgment against the Golden Bell Mining Company, which judgment was based upon a note theretofore deposited by defendant Broyles as collateral to secure payment of the notes sued upon, and having also acknowledged payment of the several other smaller amounts of money hereinbefore mentioned, which amounts are shown by the said stipulation to have been collected upon other collateral deposited for the same purpose, defendants were entitled in the rendition of said verdict to be given credit for the aggregate of said several amounts.

28. Because there was material variance between the allegations of the complaint and the proof.

29. Because the complaint contained no allegation of non-payment.

30. Because, the evidence having been conflicting as to several material questions of fact, particularly with reference to the understanding between plaintiff and the makers of the notes sued on, and the instructions of the makers to plaintiff with reference to time when said notes were to be payable, defendants were entitled to go to the jury.

31. Because the court erred in excluding testimony as to statements made by plaintiff regarding the length of time said notes were to be carried.

32. Because the court erred in excluding testimony offered by defendants in support of allegations contained in their answer and limiting their proof to allegations as to false and fraudulent representations regarding the solvency of the defendant Broyles, and as to the notes sued upon being amply secured by collateral, and in excluding all testimony by defendants with reference to the agency of the defendant Broyles, and as to representations made by the said Broyles while acting in the alleged capacity of agent for plaintiff.

33. Because the court erred in excluding testimony as to statements made by defendant Broyles in the presence and hearing of Mr. Johnson, Assistant Cashier of plaintiff bank; (1) because Broyles was acting as agent for plaintiff, (2) because statements sought to be proven were made in the presence of plaintiff's assistant cashier, and (3) they were part of the res gestae of the transaction.

34. Because the court erred in withdrawing from the consideration of the jury testimony by defendant Broyles as to his financial condition being the same at the time the note sued upon was signed as at the time of giving his testimony, and in excluding testimony of said witness as to what caused him to close his bank, and in withdrawing from the consideration of the jury testimony by the defendant Broyles as to what occurred and as to conversations had at San Marcial when Messrs. Fitch and Dougherty were present, and in excluding testimony offered by defendants through the said Broyles concerning statements made by him in the presence and hearing of Johnson, Assistant Cashier of plaintiff bank, as to how long the notes sued on were to run; and in denying defendants' offer to prove that defendant Crossman was induced to sign the note sued on by virtue of alleged false and fraudulent representations made to him by defendant Broyles while acting in the capacity of agent for plaintiff bank.

A. B. FALL, *El Paso, Texas.*  
HOLT & SUTHERLAND,

*Las Cruces, New Mexico, Attorneys for Defendants.*

- 24 In the District Court of the Third Judicial District of the Territory of New Mexico within and for the County of Socorro.

THE BANK OF COMMERCE, Plaintiff,  
vs.  
JASPER N. BROYLES et al., Defendants.

This cause coming on this day to be heard upon the motion of Schmidt & Story, Franz Schmidt, Charles H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt and Henry Evans, by Holt & Sutherland and J. F. Bonham, their attorneys, for the entry of an order extending the return day of the appeal herein and the time for settling the signing the bill of exceptions in this cause, and the court having heard said motion and there having been exhibited to the court telegraphic correspondence between attorneys for defendants and plaintiff, from which it appears that attorneys for plaintiff consent to the entry of an order as prayed; and it appearing to the Court that said defendants have shown good cause for the entry of such order, and the court being fully advised in the premises doth sustain said motion.

It is, therefore, ordered and adjudged by the Court here that said motion be and the same is hereby sustained, and that the return day of the appeal herein and the time for the settling and signing of the bill of exceptions in this cause be and the same is hereby extended for the period of ten days from and after the 1st day of October, 1908.

- 25 In the District Court of the Third Judicial District of the Territory of New Mexico within and for the County of Socorro.

No. 5244.

THE BANK OF COMMERCE, Plaintiff,

vs.

JASPER N. BROYLES, SCHMIDT & STORY, FRANZ SCHMIDT, CHARLES H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt, Charles Lewis, and Henry Evans, Defendants.

Know all men by these presents, That we, Frank Schmidt and Charles H. Story, copartners trading and doing business under the firm name and style of Schmidt & Story, William E. Pratt, H. Evans, Charles M. Crossman, Edward W. Brown, all of the County of Socorro and Territory of New Mexico, as principals, and H. Newman, Aug. Winkler, A. F. Katzenstein, Julius Campredon, Jacobo Sedillo P. N. Yunker, Abran Abeyta, F. Fischer, W. H. Liles, J. J. Leeson, Lew Gatlin, Chas. Lewis, Morris Lowenstein, as sureties, are held and firmly bound unto the Bank of Commerce of the County of Bernalillo and Territory of New Mexico in the penal sum of thirty

thousand three hundred and ninety-one dollars and sixteen cents (\$30,391.16), lawful money of the United States of America, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 31st day of August, A. D. 1908.

**26** The condition of the above obligation is such that whereas the said Bank of Commerce did on the 3rd day of July, A. D. 1908, in the District Court of the Third Judicial District of the Territory of New Mexico, within and for the County of Socorro, in the Territory aforesaid, and of the June Term thereof, 1908, recover a judgment against the above bounden principals for the sum of fifteen thousand one hundred and ninety-five dollars and fifty-eight cents, besides costs of suit; from which said judgment of the said District Court the said above bounden principals have taken an appeal to the Supreme Court of said Territory.

Now, therefore, if the said William E. Pratt, H. Evans, Charles M. Crossman, Edward W. Brown and Franz Schmidt and Charles H. Story copartners trading and doing business under the firm name and style of Schmidt and Story, shall pay the amount of the judgment, interest and costs, and all the costs that may be adjudged against them, in case such appeal be dismissed or the judgment of the District Court be affirmed in whole or in part in said Supreme Court, then the above obligation to be void; otherwise to remain in full force and effect.

FRANZ SCHMIDT,  
CHARLES H. STORY,  
SCHMIDT & STORY,  
By FRANZ SCHMIDT;  
W. E. PRATT,  
H. EVANS,  
CHARLES M. CROSSMAN,  
EDWARD W. BROWN,

*Principals.*

H. NEWMAN,  
AUG. WINKLER,  
A. F. KATZENSTEIN,  
JULIUS CAMPREDON,  
JACOBO SEDILLO,  
P. N. YUNKER,  
ABRAN ABETYA,  
F. FISCHER,  
W. H. LILES,  
J. J. LEESON,  
LEW GATLIN,  
CHAS. LEWIS,  
MORRIS LOWENSTEIN,

*Sureties.*

**TERRITORY OF NEW MEXICO,**  
*County of Socorro:*

On this 27th day of August, 1908, before me personally appeared William E. Pratt, H. Evans, Charles H. Crossman, Edward W. Brown, Franz Schmidt and Charles H. Story, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year above written.

[NOTARIAL SEAL.]

**W. W. JONES,**  
*Notary Public.*

**TERRITORY OF NEW MEXICO,**  
*County of ——:*

On this 31st day of August, 1908, before me personally appeared H. Newman, Aug. Winkler, A. F. Katzenstein, Julius Campredon, Jacobo Sedillo, P. N. Yunker, Abran Abeyta, F. Fischer, W. H. Liles, J. J. Leeson, Lew Gatlin, Chas. Lewis, Morris Lowenstein, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

[PROBATE COURT SEAL.]

**E. H. SWEET,**  
*Probate Clerk, Socorro Co., N. M.*

**TERRITORY OF NEW MEXICO,**  
*County of ——:*

H. Newman, Aug. Winkler, A. F. Katzenstein, Julius Campredon, Jacobo Sedillo, P. N. Yunker, Abran Abeyta,  
 28 F. Fischer, W. H. Liles, J. J. Leeson, Lew Gatlin, Chas. Lewis,

Morris Lowenstein the sureties named in the above bond being duly sworn, each for himself, says: That he is worth the sum set opposite his name below over and above all his debts and liabilities, exclusive of property exempt from execution and forced sale:

H. Newman.....	\$10,390.16
Aug. Winkler.....	5,000.00
A. F. Katzenstein.....	1,000.00
Julius Campredon.....	1,000.00
Jacobo Sedillo.....	500.00
P. N. Yunker.....	2,000.00
Abran Abeyta.....	1,000.00
F. Fischer.....	1,000.00
W. H. Liles.....	1,000.00
J. J. Leeson.....	1,000.00
Lew Gatlin.....	500.00
Chas. Lewis.....	2,000.00
Morris Lowenstein.....	3,000.00

Subscribed and sworn to before me this 31st day of August, 1908.  
 [PROBATE COURT SEAL.] E. H. SWEET,

*Probate Clerk, Socorro Co.*

The foregoing bond as to form and sufficiency of sureties approved by me this 31st day of August, A. D. 1908.

WILLIAM E. MARTIN,  
*Clerk 3rd Jud. Dist. Ct.*  
 By WM. D. NEWCOMB, *Deputy.*

and which said Bond bears the following endorsement, to-wit:

Filed in my office this 31st day of August, 1908.

WILLIAM E. MARTIN, *Clerk.*  
 WM. D. NEWCOMB, *Deputy.*

29

No. 5244.

District Court, Socorro County.

BANK OF COMMERCE, Plaintiff,

vs.

JASPER N. BROYLES et al., Defendants.

*Order Extending Return Day to November 2, 1908.*

Filed in my office this 29th day of September, 1908.

WILLIAM E. MARTIN, *Clerk.*  
 WM. D. NEWCOMB, *D'p'ty.*

HOLT & SUTHERLAND,

*Las Cruces, N. M., Attorneys for — — —.*

In the District Court of the Third Judicial District of the Territory of New Mexico, within and for the County of Socorro.

No. 5244.

THE BANK OF COMMERCE

vs.

JASPER N. BROYLES et al.

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In the District Court of the Third Judicial District of the Territory  
of New Mexico, within and for the County of Socorro.

No. 5244.

THE BANK OF COMMERCE  
vs.  
JASPER M. BROYLES et al.

Be it Remembered that on this twenty-ninth day of June, A. D. 1908, the above entitled cause came on for trial; and thereupon the following testimony was introduced, to-wit:

W. J. JOHNSON, a witness called on behalf of the plaintiff, being first duly sworn according to law, upon his oath testified as follows, to-wit:

31 Direct examination.

By H. A. DOUGHERTY, Esq.:

Q. State your name to the jury.

A. W. J. Johnson.

Q. What position, if any, do you hold with the Bank of Commerce of Albuquerque, New Mexico?

A. Assistant cashier.

Q. State whether or not you have in your custody or as such officer the paper taken by the Bank, notes, if you have the notes.

A. Yes, sir.

Q. Kindly look at this paper which I hand you and state what if anything has been paid upon that note.

A. \$1,500.

Marked for identification "A."

Q. Look at this paper and state whether or not anything has been paid on that note.

A. No.

Marked for identification "B."

Plaintiffs offer in evidence the notes "A" and "B."

Defendant objects; no identification. They have put this witness on the stand to prove that he is the custodian of the notes and other papers in the Bank of Commerce, and then he has offered the paper here and asked if there has been any payment upon it and he states there has been and that is all. Now they offer these in evidence. I simply want the foundation laid in the proper shape.

By the COURT: I fail to understand the point exactly of the objection. Now here is a promissory note sued on. The genuineness of the signatures are not denied and there is no question about the document itself. Now the fact that Mr. Dougherty, the attorney for the plaintiff in this case, has these notes in his possession is an identification of the instruments it seems to me.

Objection overruled.

Exception.

Marked Exhibits "A" and "B".

### 32 Cross-examination.

By A. B. FALL, Esq.:

Q. You say you are the custodian of the notes and papers of the Bank of Commerce?

A. Yes, sir; in connection with the cashier.

Q. You are the assistant cashier?

A. Yes, sir.

Q. And you have identified these two notes offered in evidence as I understand?

A. Yes, sir.

Q. One of which is for \$10,000 and the other for \$5,000.

A. Yes, sir.

Q. Do you identify those notes as the notes which are sued on in this case?

A. Yes, sir.

Q. And you say that upon one of the notes, that is the \$5,000 note, there has been a payment of \$1,500?

A. Yes, sir.

Q. And that there has been no further or other payment of any kind whatsoever upon either of the notes?

A. Not to my knowledge.

Q. There may have been without your knowledge?

A. I hardly think so.

Q. That is, your knowledge is from the fact that there is no other payment endorsed on either of the notes, is that it?

A. No, not altogether from that. I keep the general cash book and all payments on notes would come through that book.

Q. Then you are testifying from your familiarity not only with the notes themselves, but with the books of the Bank?

A. Yes, sir.

Q. How are you able to identify these notes, Mr. Johnson?

A. Why because I took them down to San Marcial and the body of the note is filled out in my handwriting.

Q. You took them down to San Marcial. These notes then—you say the body of the note—just show the jury what you mean by the body of the note.

33 A. I just filled in, on demand we promise to pay so much.

Q. That is the figure \$10,000?

A. \$10,000 and \$5,000.

Q. And the words "on demand?"

A. Yes, sir.

Q. And the date?

A. Yes, sir.

Q. And the other words written in ink except the signatures?

A. Yes, sir.

Q. You say that you took these notes down to San Marcial filled in?

A. Yes, sir.

Q. At the time you took them to San Marcial were all the words filled in?

Object to this. If the gentlemen want to make the witness their witness we have no objection in the world, but we object to the question as to what he did in San Marcial. We have simply asked this witness as to one question alone as to whether or not there was any payment on the note. As to what he did in connection with the notes they have nothing to do with unless they want to make him their witness.

Overruled.

Exception.

A. Yes, sir.

Q. The words "on demand" were filled in at the time you took these notes to San Marcial?

Same objection. If the gentlemen want to make the witness their witness we have no objection in the world, but we object to the question as to what he did in San Marcial. We have simply asked this witness as to one question alone as to whether or not there was any payment on the note. As to what he did in connection with the

notes they have nothing to do with unless they want to make him their witness.

Overruled.

Exception.

A. Yes, sir.

34 Q. You are as positive of that fact as you are that there has only been \$1,500 paid on these notes?

Same objection. If the gentlemen want to make the witness their witness we have no objection in the world, but we object to the question as to what he did in San Marcial. We have simply asked this witness as to one question alone as to whether or not there was any payment on the note. As to what he did in connection with the notes they have nothing to do with unless they want to make him their witness.

Overruled.

Exception.

A. Yes, sir.

Q. You say that you took the notes to San Marcial filled out except as to the signatures.

Same objection. If the gentlemen want to make the witness their witness we have no objection in the world, but we object to the question as to what he did in San Marcial. We have simply asked this witness as to one question alone as to whether or not there was any payment on the note. As to what he did in connection with the notes they have nothing to do with unless they want to make him their witness.

Overruled.

Exception.

A. Yes, sir. I did not answer that question; no.

Q. Will you answer it?

A. You asked me if I took it down with the exception of the signatures?

Q. All filled out just as this is now with the exception of the signatures?

A. No, there was some of the signatures on when I took them down upon the notes.

Q. What signatures were there when you took them down?

Same objection. If the gentlemen want to make the witness their witness we have no objection in the world, but we object to the question as to what he did in San Marcial. We have simply asked this witness as to one question alone as to whether or not there was any payment on the note. As to what he did in connection with the notes they have nothing to do with unless they want to make him their witness.

This is going into the case indirect.

35 We did not throw open the doors for any such purpose. The gentlemen are going into the entire side of their case which we submit is not fair. Nothing to do with our case.

By the COURT: This has been opened up by way of cross-examination the subject matter of the defense claimed here. Now that is not hardly a fair procedure to carry on the cross-examination so freely simply by reason of the asking of a question which was an unnecessary question, and I believe I will be compelled to limit this cross-examination. This last objection sustained.

Objection sustained.

Exception.

Q. You have stated that those were the property of the Bank of Commerce; how do you identify those notes?

A. My handwriting.

Q. Are the signatures in your handwriting?

A. No, sir.

Q. Then how do you know those are the property of the Bank of Commerce?

Objected to. Not proper cross-examination.

Overruled.

Exception.

A. They have our entry numbers on.

Q. Is that the only means of identification?

Same objection. Not proper cross-examination.

Overruled.

Exception.

A. Not any more than I told you before, my handwriting and the entry number.

Q. Now as I understand, you have testified that you took those pieces of paper filled out to San Marcial with the body of the notes filled out exactly as they are now. What did you do with them there?

Same objection; not proper cross-examination and general objection to same question.

By the COURT: This would be permitting the development  
36 of the facts relative to the defendant. I do not think this admissible.

Sustained.

Exception.

Q. Now Mr. Johnson you examine those notes again closely please. What do you find on the back of them?

A. April 16, 1908. Paid \$1,500.

Q. Now you have testified on direct examination that there has only been paid \$1,500 upon those notes. That is true is it?

A. As far as my knowledge goes; yes, sir.

Q. And you testify that through your knowledge of the books and of the papers and of the business of the Bank if there had been anything more paid you would have known it?

A. Yes, sir; I think I should.

Q. Is it not a fact then that \$5,000 more then has been paid on those notes?

A. No, sir.

Q. That is positive?

A. As far as I know; no.

Q. Has there been paid to the Bank from any one up to this time \$5,000, or any other sum in addition to the \$1,500, endorsed as a payment which should be a credit upon those notes?

A. No.

Q. There has not. Do you know anything about the New Golden Bell Mining Company?

A. No, don't know anything about it.

Q. Do you know anything about a note or indebtedness of theirs which has been paid recently by new notes or otherwise?

A. I know about a note of the New Golden Bell Mining Company that has not been paid yet. That is, we don't consider it paid.

Q. Do you know anything about a judgment obtained by your Bank against the New Golden Bell Mining Company?

A. No, that did not come under my province.

Q. And the books of the Bank would not show it?

A. Not a judgment, no, or anything or that sort would not have anything to show.

37 Q. Who would keep those books which would show the entry of a judgment obtained by your bank and action by the Bank upon it?

A. That would come under general correspondence and our attorneys I suppose.

Q. If there was a judgment rendered in this case and any action was had by the Bank upon that judgment who would you know it or would you know it at all?

A. We would have a transcript of the proceedings from our attorney.

Q. Suppose the judgment was paid would you know it?

A. Yes, sir; if it was on a note I would know it.

Q. If a judgment was obtained upon a note and that note was paid you would know it?

A. Yes, sir; I would know it.

Q. How many ways do you recognize as a banker of paying a debt?

A. Don't consider a debt to be paid until we get the money.

Q. Then if you have my note and you get a judgment upon it and you get a judgment against me and then you accept my note in payment of that judgment you don't consider that that discharges the other party nor is a payment of the debt?

A. I do not know whether you would or not.

Q. I will come back to the case at bar. You say that you know something about the Golden Bell note that was held by your Bank?

A. Yes, sir.

Q. And that that note has not been paid?

A. I am sure — could not say. That would not come through my general work. It was simply held — collateral; it was not discounted.

Q. Now then, if a note held as collateral to these notes that you

are talking about that you have here in your hands was paid you would not know anything about it would you?

A. Yes, sir; if we got the cash I would know something about it.

Q. But if you took horses or cows or a new note or something else that was satisfactory to you, to your Bank, you would not know anything about it unless it was actual money?

38 A. I would know about it; but it would not go on the books.

Q. It would not go on the books?

A. No, sir.

Q. Now I am asking you what you know about it. Has that Golden Bell not been paid or not. I mean the original Golden Bell note.

A. Possibly been paid by other collateral.

Q. Well was it paid or not. You say you would know but you *wou* would not know from the books?

A. I should not consider it paid until that collateral was paid.

Q. Now you say that you knew this Golden Bell note as collateral. Well now collateral to what?

A. Collateral to the notes that we had discounted for Mr. Broyles.

Q. It was collateral to what?

A. To notes we discounted to cover an over-draft.

Q. Collateral to a note you discounted?

A. To notes.

Q. What was the amount of the notes that you discounted to cover that over-draft?

A. About \$9,800.—\$9,900. something of that sort.

Q. Is that the list of notes that you discounted?

A. Yes, sir.

Q. Is that Golden Bell Mining Company note is not in there is it?

A. No, sir; did not discount.

Q. You did not discount that?

A. No, sir.

Q. What did you do with that?

A. It was sent to us as collateral to secure the notes that we discounted.

Q. Sent you by Mr. Broyles?

A. Yes, sir.

Q. You took certain notes here to the amount of \$9,997.14 from Mr. Broyles and gave him credit for them?

A. Yes, sir.

Q. \$9,997. Now after having done that you had in your Bank these two notes in your hands and another note for \$10,000. of Mr. Broyles and with other signatures?

A. Yes, sir.

39 Q. Now those notes were discounted on March 11, 1908 were they not?

A. Yes, sir; just about that time, may have been day before or day after. Could not have been the day after.

Q. And credit was given Mr. Broyles?

A. Yes, sir.

Q. What became of that Golden Bell note at that time?

A. We kept that as collateral.

Q. You wrote to Mr. Broyles on May 18th, didn't you?

A. Yes, sir; the Bank wrote, Yes, sir.

Q. That Golden Bell note is mentioned in there is it not?

A. Yes, sir.

Q. As being held as collateral?

— Yes, sir.

Q. Where is that Golden Bell note now that was mentioned in this letter of May 18th, this letter of the Bank of May 18th?

A. Don't know.

Q. You held it as a collateral for Mr. Broyles' indebtedness didn't you?

A. Yes, sir.

Q. You don't know where it is now?

A. No, sir; I do not know what disposition Mr. Strickler made of it.

Q. As far as you know it may have been paid?

A. Well as far as I know it may have been but I doubt it.

Q. There are other notes mentioned in this same letter of May 18th, amounting to a total of \$16,008.29?

A. Including that \$5,000?

Q. Yes, sir; including that \$5,000.

A. Yes, sir.

Q. And do you know where those notes are?

A. Yes, sir; I presume they are there.

Q. All there.

A. I presume so, as far as I know.

Q. Well you are testifying positively that you know what amounts have been paid on these notes now that you are being sued on?

A. That is true enough. That would come directly through my hands; the other would not. Any payment upon these other 40 notes that would be discounted would come through me, directly through my hands.

Q. There is a certain note mentioned here in this list of May 18th of Sanchez, Lane and Sanchez, \$400. do you know anything about that note?

A. I did not know something about it.

Q. Where is it?

A. Well I took that to Mr. Broyles and left it with him. My recollection whether it was returned or not I do not know.

Q. When was it you took it over to Mr. Broyles?

A. Sure I could not recall the date.

Q. Prior to May 18th?

A. Could not tell.

Q. Well I can refresh your memory; I think I have the date when you took it. On March 11th, the Bank writes that you left with Mr. Broyles that note doesn't it?

A. That is when this letter was written. I do not know what day it was I took it down.

Q. It must have been at that time or prior thereto?

A. Prior certainly.

Q. And on May the 18th the Bank writes that they have that Lane note there in the Bank don't they?

A. Then it must have been returned.

Q. And if it has been paid you do not know it?

A. No, I don't.

Q. And you would not know it if it had been paid or any of that collateral?

A. Yes, sir; I think I would know it if it had been paid. But any of those notes that are paid if we get the money for it goes as credit to some account.

Q. Well now if you get a judgment or make a collection neither by cash or by a new note or in any other way don't your books show it?

A. If it has been discounted. Yes, sir.

Q. Well you only run the discount books of the Bank is that all?

A. No, I run the general cash, but then collateral notes are simply taken and attached to various papers or kept in the collateral pouch.

Q. Now as a matter of fact Mr. Johnson *that* you had as you have testified the Bolden Bell note for \$5,000, and these 41 other notes together with the Golden Bell note amounting to a total of sixteen thousand dollars more or less in your Bank, holding them there for what Mr. Broyles owed you as additional security, together with this—these notes that are now being sued on?

A. As additional security for these notes?

Q. Yes, sir?

A. We didn't consider that we held them for that purpose.

Q. Well you had them there?

A. Yes, sir.

Q. If you collected them, or any of them, the amount so collected should have been applied to Mr. Broyles' account should it not as a credit?

A. No not—Oh, these collateral notes?

Q. These collateral notes?

A. Yes, they should have gone to some of the accounts if they had been collected and paid.

Q. Is it not a fact you know that your Bank sued the Golden Bell Mining Company for \$5,000. on one of these notes which had been turned over to you by Mr. Broyles; that you got a judgment against the Golden Bell Mining Company; that that judgment is marked satisfied on the records of this county, is it not a fact?

A. Well I do not know that it is. I know that there was some suit against them but how it was terminated or what was done with it I do not know. It is out of my hands. I had nothing to do with that part of the business. I cannot shoulder it all.

Q. The note was sued upon, you know that.

A. Yes, sir; I know that. I know these things all in a general way about that, but not sufficiently to testify one way or the other.

Q. If that note was satisfied by the giving of a new note would you know it?

A. I would know if there was a new collateral given, possibly be told, but I do not know from my own personal knowledge because I had nothing to do with the transaction.

Q. But as custodian as you have testified you were custodian of the notes of this Bank?

42 A. Well I am partially in connection with the cashier as I told you.

Q. Then as custodian of the notes would you not know it if a new note had been given for this Golden Bell debt?

A. No, I would not.

Q. Then you do not know whether there has been a new note given.

A. That is what I told you just now, that I did not know whether there had been a new note given.

Court in recess.

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and the attorneys for the defendant that the plaintiff need put in no proof as to the reasonableness *at* attorney's fees, but that the same is hereby stipulated and the jury authorized to find 10 per cent upon any amount which may be recovered by plaintiff from the defendant as such attorney's fees. And we stipulate and agree that the Court may so charge.

Defendant concludes cross examination with the right to further cross examine if they find it necessary.

Plaintiff rests.

The two notes Exhibits "A" and "B" read to the jury.

*Defense.*

JASPER N. BROYLES, one of the defendants, being first duly sworn according to law, upon his oath testified as follows, *to-wit*:

Direct examination.

By H. B. HOLT, Esq.:

Q. What is your name?

A. Jasper N. Broyles.

Q. Where do you live Mr. Broyles?

A. At San Marcial.

Q. How long have you lived there?

A. Twenty-four years.

Q. Are you one of the defendants in this case?

A. Yes, sir.

Q. In what business were you engaged at San Marcial up to the 21st of April this year?

43 A. General merchandise and banking.

Q. How long had you been engaged in business?

A. Twenty-two years.

Q. Do you know the plaintiff, The Bank of Commerce?

A. Yes, sir.

Q. Do you know your co-defendants in this suit?

A. Yes, sir.

Q. Are you acquainted with Mr. W. J. Johnson the assistant cashier of the Bank of Commerce?

A. Yes, sir.

Q. The man who testified here on behalf of the plaintiff in this cause?

A. Yes, sir.

Q. Prior to the 21st of April, 1908, had you any business relations with the Bank of Commerce?

A. Yes, sir.

Q. How long had you been transacting business with that bank prior to that time?

A. About fifteen years.

Q. Mr. Boyles please examine these notes marked Exhibits "A" and "B" and state if you ever saw them before?

A. Yes, sir.

Q. Were these notes executed upon the date which appears upon them?

A. Yes, sir.

Q. Did you have anything to do with the procurement of the signatures to these notes?

A. Yes, sir.

Q. When and where did you first see these notes prior to the time when they were signed as they now appear?

A. San Marcial.

Q. In whose possession?

A. Mr. Johnson's.

Q. Do you refer to the gentleman who testified here this afternoon?

A. Yes, sir.

Q. When Mr. Johnson came to San Marcial with these notes in his possession did any conversation pass between you and him with reference to the execution of same?

A. Yes, sir.

44 Q. I wish you would please state that conversation to the jury?

Objection to this upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff.

Jury withdrawn.

Overruled.

Exception.

Further objection, that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case.

Overruled.

Exception.

Objected to as incompetent, irrelevant and immaterial and not in accordance with the pleadings.

Overruled.

Exception.

A. The conversation between Johnson and I?

Q. Yes, sir; the question relates to the conversation had between you and Mr. Johnson when he came to San Marcial with these notes?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made to Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in accordance with the pleadings.

Overruled.

Exception.

A. Mr. Johnson asked me to give the names of good reliable parties that would endorse my note or go on the notes with me and I give those names that are on the notes and he asked me to send for them.

Q. For what purpose?

A. To endorse the notes. This I did. The parties came in and signed the notes.

Move to strike out the answer of the witness as immaterial, irrelevant and incompetent. Immaterial under the allegations of the defendant's answer.

Motion denied.

45      Exception.

Q. What if any statement did Mr. Johnson make to you as to his business or mission in coming to San Marcial with these bank notes?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in accordance with the pleadings.

Overruled.

Exception.

By the COURT: To each objection overruled and motion denied. The objection and motion will be considered as applicable to each question and answer relating to this particular subject.

Q. And as to whom he represented if any one?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Well he represented the Bank of Commerce.

Objected to as not responsive to the question.

Sustained.

Exception.

Q. If you know state whom Mr. Johnson was representing upon this occasion?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case, incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

46 A. He was assistant cashier representing the Bank of Commerce.

Move to strike out the answer of the witness as immaterial, irrelevant and incompetent. Immaterial under the allegations of the defendants' answer.

Overruled.

Exception.

(Objection on the same ground and exception after each question.)

Q. By the Bank of Commerce do you mean the plaintiff in this case when you say he was representing the Bank of Commerce, do you refer to the plaintiff in this case?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out the answer as incompetent, irrelevant and immaterial. Immaterial under the allegations of the defendant's answer.

Overruled.

Exception.

Q. Now go ahead and answer the remainder of the question as to what if any statements were made to you by Mr. Johnson acting in that capacity as to his purpose or mission in San Marcial when he came down there with these blank notes?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson and Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

There is no evidence of blank notes.

Strike out the word "blank."

Q. Now go ahead and answer the remainder of the question as

to what if any statements were made to you by Mr. Johnson acting in that capacity as to his purpose or mission in San Marcial when he came down there with these notes?

47      Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Mr. Johnson remarked that he wanted to make a good showing before the directors in their next meeting. He acknowledged that they were satisfied with my name alone but they wanted to satisfy the directors.

We wish to add the further objection in addition to the objection which we already have. There is an additional objection as to the purpose for which the notes are wanted. Immaterial. The notes speak for themselves; and this attempt, if relevant at all, is to contradict the instruments themselves which have been offered in evidence. Involves a question as to a future statement as to a promissory character as to what use the notes were to be put to and not competent.

Move to strike out the answer as immaterial, incompetent and irrelevant. Immaterial under the allegations of the defendants' answer.

Move to strike out on the additional ground that it is an attempt to contradict the instrument by proving something of a promissory character which was stated by Mr. Johnson as to what he intended to do. The notes speak for themselves.

Move to strike out as to his intent.

By the COURT: I indicated in the room the scope to which your defense would be limited. This is without that scope. Absolutely immaterial what they were going to do with these notes. The question is how did they get these signatures.

My proposition is this in this case. There is an allegation of three present existing facts, which facts you claim induced your men to sign these notes. Now that is all you can prove are those facts.

Motion sustained.

Exception.

48      By the COURT: Gentlemen, you will not consider this last answer of the witness.

Q. Mr. Broyles what if any statement did Mr. Johnson make to you upon that occasion with reference to the procurement of the signatures which appear upon these notes other than your own signature?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made

to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. He wanted some more good men on the note.

Move to strike out the answer as immaterial, incompetent and irrelevant. Immaterial under the allegations of the defendants' answer.

Overruled.

Exception.

Q. Acting upon Mr. Johnson's request you say you sent out and asked these men to come in and sign the notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out the answer as incompetent, irrelevant and immaterial. Immaterial under the allegations of the defendants' answer.

Motion denied.

Exception.

Q. Did you or Mr. Johnson have any conversation with any of the parties whose signatures appear upon these notes before they signed them?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant  
49 and immaterial and not in conformity with the pleadings.

And the additional objection that the question involves the two parties Mr. Johnson and Mr. Broyles, additional to the general objection which is being carried along. We object to any conversation that was had by Broyles as he is in no way an agent of the Bank.

Overruled.

Exception.

A. Yes, sir; some of them.

Move to strike out the answer as incompetent, irrelevant and immaterial. Immaterial under the allegations of the defendants' answer.

Motion denied.

Exception.

Q. With whom were such conversations had?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made

to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

And the additional objection that the question involves the two parties Mr. Johnson and Mr. Broyles. We object to any conversation that was had by Broyles as he is in no way an agent of the Bank.

**Overruled.**

**Exception.**

A. Mr. Evans, Mr. Anderson and Mr. Lewis.

Move to strike out the answer as incompetent, irrelevant and immaterial. Immaterial under the allegations of the defendants' answer.

**Motion denied.**

**Exception.**

Q. Where were those conversations?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

And the additional objection that the question involves the two parties Mr. Johnson and Mr. Broyles. We object to any conversation that was had by Broyles as he is in no way an agent of the Bank.

**Overruled.**

**Exception.**

A. San Marcial.

Move to strike out the answer as incompetent, irrelevant and immaterial. Immaterial under the allegations of the defendants' answer.

**Denied.**

**Exception.**

Q. What part of San Marcial?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

And the additional objection that the question involves the two parties Mr. Johnson and Mr. Broyles.

We object to any conversation that was had by Broyles as he is in no way an agent of the Bank.

**Overruled.**

**Exception.**

A. In my office.

Move to strike out the answer as incompetent, irrelevant and im-

material. Immaterial under the allegations of the defendants' answer.

Motion denied.

Exception.

Q. In your bank?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

51 And the additional objection that the question in — les.

We object to any conversation that was had by Mr. Broyles as he is in no way any agent of the Bank.

Overruled.

Exception.

A. Yes, sir.

Move to strike out the answer as incompetent, irrelevant and immaterial. Immaterial under the allegations of the defendants' answer.

Motion denied.

Exception.

Q. Who was present at the time of the conversation with Mr. Evans?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

And additional objection that the question involves the two parties Mr. Johnson and Mr. Broyles. We object to any conversation that was had by Broyles as he is in no way an agent of the Bank.

Overruled.

Exception.

A. Myself.

Move to strike out as incompetent, irrelevant and immaterial. Immaterial under the allegations of the defendants' answer.

Motion denied.

Exception.

Q. Anybody else?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

And the additional objection that the question involves

52 the two parties Mr. Johnson and Mr. Broyles. We object to any conversation that was had by Broyles as he is in no way an agent of the Bank.

Overruled.

Exception.

A. I do not remember.

Move to strike out as incompetent, irrelevant and immaterial. Immaterial under the allegations of the defendants' answer.

Motion denied.

Exception.

Q. Were you present—was Mr. Johnson present at the conversation between you and Mr. Evans?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

And additional objection that the question involves the two parties Mr. Johnson and Mr. Broyles. We object to any conversation that was had by Broyles as he is in no way an agent of the Bank.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial. Immaterial under the allegations of the defendants' answer.

Motion denied.

Exception.

Q. Now Mr. Broyles I will ask you to state to the jury what if any statements were made to Mr. Evans at that time and place by Mr. Johnson regarding signing of these notes, limiting your answer first to statements made by Mr. Johnson?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

And additional objection that the question involves the two parties Mr. Johnson and Mr. Broyles. We object to any conversation that was had by Broyles as he is in no way an agent of the Bank.

And the further objection that the witness has already testified that he made the statements and not Mr. Johnson.

Overruled.

Exception.

A. Mr. Johnson stated to Mr. Evans that they were satisfied with the paper but they wanted more good signatures; that they were

perfectly willing to carry me as long as I wanted it and that they would not bother him?

Same general motion. Move to strike out the answer as incompetent, irrelevant and immaterial. Immaterial under the allegations of the defendants' answer.

And the addition- motion to strike out as to what he said in regard to not bothering him and future statements, statements of a promissory character as to what would be done with the notes in the future. Move to strike that out as being of a promissory character within the rulings of the court.

By the COURT: A portion of this answer is incompetent. Ruling reserved.

Q. What if any statement was made by Mr. Johnson in that conversation as to why the Bank was perfectly satisfied with your name alone and as to why the Bank was perfectly willing to carry you as long as you wanted them to?

Same objection upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff, and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

And for the further reason that it is leading.

Overruled.

Exception.

54 A. He said that the object was to satisfy the Board of Directors.

Move to strike out the answer as incompetent, irrelevant and immaterial. Immaterial under the allegations of defendants' answer.

Ruling reserved.

Q. In the conversation between Mr. Johnson and Mr. Lewis in your presence at this time and Mr. Evans was there or not made by Mr. Johnson any statement as to your financial responsibility?

Same objection upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff, and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings. Leading.

Overruled.

Exception.

A. Yes, sir.

Move to strike out the answer as incompetent, irrelevant and immaterial. Immaterial under the allegations of the defendants' answer.

Motion denied.

Exception.

Q. What was that statement?

Objected to upon the ground that any conversation had with Mr.

Johnson is not binding upon this plaintiff, and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. That I was perfectly good but they wanted a good showing before the directors.

Move to strike out the latter part of the answer in relation to the purposes for which they wanted the paper with the additional objection that has heretofore been interposed generally that it is incompetent, irrelevant and immaterial. Immaterial under the 55 allegations of the defendants' answer.

Move to strike out those parts of the answer.

By the COURT: Now, Gentlemen, the last two or three answers of this witness he has referred to a statement by Johnson that these notes were desired in order to satisfy the Board of Directors of the Bank of Commerce and that the Bank of Commerce would not bother this man Evans about this note. Those portions of his answers are not for your consideration.

Exception.

Object to this defendant Broyles consulting with the other defendants. The gentleman is on the witness stand.

Jury withdrawn.

By Mr. FALL: The object of the line of testimony which is now being introduced, may it please the Court, is first; we propose to show by the evidence of this witness and of other witnesses, by the conversation of Mr. Johnson with this witness and other witnesses, that Mr. Broyles, as has been testified here, was a banker doing business in San Marcial; that he had a great deal of business with the Bank of Commerce; that for certain purposes and particularly with reference to the transaction which is now being investigated by the Court Mr. Broyles was the agent of the Bank. We cannot show Mr. Broyles' agency except by such kind of testimony as we are offering; that Mr. Broyles was the agent, was in consultation with the Bank; was carrying out the Bank's purposes; was doing what they required him to do; and in this particular transaction was acting as their agent. That it is perfectly competent to show all the conversations between Mr. Johnson and this witness and everything that was said as to the use of these notes, as to the purpose for which the signatures were desired, as tending to show the close relationship between the Broyles Bank and the Bank of Commerce and the agency of Mr. Broyles for the Bank of Commerce in this particular transaction. That it is also perfectly competent, though the Court has ruled against us, but I want to make the statement, to show by this evidence—we propose to show by this evidence and the evidence of the other witnesses in this case that the payee of this paper, the 56 Bank of Commerce, acting through itself by Mr. Johnson and through its agent, Mr. Broyles, made statements to the signers of this note, or to some of them, to all of them, one or the

other making the statements to some of them, the statements being made by Mr. Johnson in Mr. Broyles' presence or by Mr. Broyles in Mr. Johnson's presence, that Mr. Broyles was at that time financially responsible; that this bank, of which he was the agent, regarded him as absolutely responsible and were not taking this note to protect themselves upon any debt which he owed them but were asking this note simply for the purpose of satisfying the Territorial Bank Examiners.

By Mr. DOUGHERTY, Plaintiff: We object to this line of proof upon a matter which your Honor has already ruled which I will restate as to the first ground. Upon the ground that any statement that Mr. Johnson made is not binding upon the plaintiff, there being no authority shown in Mr. Johnson to make any statements which would bind the bank and from the position which he occupied with the Bank the authority could not be presumed; second, that as to any statements which were made by Mr. Johnson which partook of the nature of a promissory character as to what would or would not be done with the paper or as to the intent of taking the paper is improper because it attempts to contradict the terms of the written contracts themselves.

And we further object to any statements that were made to any of the parties who were the original parties upon the note, Mr. Evans being one who signed the note. The note or notes that had heretofore been held by the Bank of Commerce.

By the COURT: Gentlemen, I have ruled that proof of at least two facts alleged to have been represented at the time of this interview and the procuring of these signatures was competent, namely, that the Bank of Commerce knew that Broyles was solvent and that he was solvent, and that the note was secured by collateral. Now those two facts may be proven. Now the third proposition as to what they wanted these notes for, namely, to satisfy the Board of Directors of the Bank of Commerce and the Territorial Bank Examiner is absolutely immaterial and incompetent.

We note an exception to the ruling.

57 By the COURT: I will state further that I am satisfied that it is incompetent to offer any evidence in support of the allegation that a statement made by the plaintiff that it would never bother these men about this money. Now that is incompetent because it practically antagonizes the parole evidence exclusion rule.

Jury brought in.

By the COURT: I will state to the jury. Gentlemen; when I said that certain portions of the last two or three answers of this witness would not be for your consideration I did not take from your consideration all of the answers, only such portions as I mentioned.

Q. Now Mr. Broyles you have testified that Mr. Evans, or rather Mr. Johnson stated to Mr. Evans that you were perfectly solvent. Now what further specific statement with reference to your financial condition at that time, if any was made by Mr. Johnson in that conversation with Mr. Evans?

Same objection on the ground that any conversation had with Mr.

Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in the case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Mr. Johnson said that my resources were something over fifty thousand dollars above all my indebtedness and that they held collateral notes.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. That who held collateral notes?

Same objection on the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in the case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Bank of Commerce.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. For this indebtedness for which these notes were being given?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in the case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What if any statement did Mr. Johnson make to Mr. Evans in that conversation as to the amount of the collateral security which the Bank of Commerce held for these notes?

Same objection on the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in the case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. The same as I stated before.

Move to strike out the answer as incompetent, irrelevant  
59 and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What did you say before?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in the case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Well that my resources was fifty thousand dollars above my indebtedness, and that they held collateral to cover it.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. That the Bank of Commerce held collateral to secure what?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. These notes.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did he state the amount of the collateral security which the Bank held?

Objected to upon the ground that any conversation had  
60 with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend

to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I think so.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendants' answer.

Motion denied.

Exception.

Q. Well if you remember state what he said about that as to the amount?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Something like sixteen thousand dollars of collateral they were holding.

Move to strike out the answer as incompetent, irrelevant and immaterial; and immaterial under the allegations of the defendants' answer.

Motion denied.

Exception.

Q. Did he say anything about any other security which the Bank held for these notes?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

61      Exception.

A. Yes, sir.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What statement did he make?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made

to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. That they held two insurance policies.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. If he stated the amount of those insurance policies state it to the jury.

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. One was \$10,000 and the other was \$5,000.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Now Mr. Broyles at that time did he say anything about any other that you remember?

62 Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I think so.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What did he say?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. That they held a mining stock for \$25,000.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Whose mining stock?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

63 A. The New Golden Bell Mining Company of Rosedale.

Q. Issued to whom?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

And in addition we object to his testifying to what he knows and not what Johnson stated.

Overruled.

Exception.

A. To myself.

Move to strike out as incompetent, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied and exception.

By the COURT: You understand Mr. Witness you are talking about what Mr. Johnson said, not what you know yourself.

A. Yes, sir.

Q. And what you have thus far testified to the jury has been what Mr. Johnson said to Mr. Evans in your presence is it?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. At the time of this conversation Mr. Broyles with Mr. Evans

64 and in the presence of Mr. Johnson, did you make any representations to Mr. Evans regarding your financial condition and regarding the security this Bank of Commerce held for these notes; if so state what you said.

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

And objected to for the additional ground to the objection already stated that we are not bound by Mr. Broyles' statements in any way. That we are not bound in any way by statements made by Mr. Broyles whether made in the presence of Mr. Johnson or not. The plaintiffs are not bound.

By Mr. HOLT: I will eliminate the last part of the question "if so state what you said."

Objection withdrawn except the general objection that is continued to all these questions; that is the objection that was stated at first.

Overruled.

Exception.

A. I made no statement to Mr. Evans.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Court in recess until two o'clock Tuesday afternoon, June 30.

Q. Mr. Broyles, as I understand, you have stated this morning that Mr. Johnson made certain statements at or about the time of the signing of these notes to Messrs. Evans and Lewis and Anderson in your presence?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

65 Overruled.

Exception.

A. Yes, sir.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. You have testified as to the statements made to Mr. Evans

by Mr. Johnson; what statements, if any, were made by Mr. Johnson to Mr. Lewis with reference to the signing of these notes concerning your financial responsibility?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I do not know sir.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. In your presence were there any?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. They were talking among themselves. I do not know just what was said.

66 Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. You say, they, by whom do you mean, they?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Mr. Lewis and Mr. Johnson.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Was that before the signing of these notes?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff and that statements made by Johnson to Broyles do not show or tend to show statements made

to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out the answer as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Had you yourself had any conversation with Mr. Lewis prior to the signing of this note by him about his security?

Objected to upon the ground that any conversation with Mr. Johnson is not binding upon this plaintiff, and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings. We are not bound by any statements made by Broyles.

67 Overruled.  
Exception.

A. No, sir.

Q. Mr. Broyles you say that you were in the banking business?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. In San Marcial?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Are you still in the banking business?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; im-

material under the allegations of the defendant's answer.

Motion denied and exception.

Q. What has become of your banking business, if anything?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I closed the bank.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

68 Motion denied and exception.

Q. How was the bank closed?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Objection overruled.

Exception.

A. By the Bank of Commerce bringing suit against me and other claims.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Overruled.

Exception.

Q. This suit you mean?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Objection overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

If it was closed through any action of this suit why the record is the best evidence. Conclusion of the witness.

By the COURT: It seems to me the only relevant consideration now is whether this statement was true about his condition.

By Mr. FALL: That is just what I am driving at, may it please the Court.

Overruled.

Exception.

Q. How long had you been doing business with the Bank of Commerce?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. About fifteen years.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

69 Q. How long have you known Mr. Johnson?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Probably two or three years.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. During the two or three years that you have known him, who if anyone has he been representing?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Objection overruled.

Exception.

A. Bank of Commerce.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Have you seen Mr. Johnson in San Marcial prior to the time when he came down there with these notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I think he was there once before.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. How long was he there at the time of the signing or the procuring of the signatures to these notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Objection overruled.

Exception.

A. Two or three days.

70 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What opportunity, if any, did Mr. Johnson have to inform himself as to the status of your business at that time or on his visit prior to this time?

Same objection; incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Mr. Johnson examined my books with my son and myself.

(Same objection straight through.)

Move to strike out as incompetent, immaterial and *incompetent*; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What books?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. The banking books and grocery books.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Were all your business transactions carried on and down, memorandum of your business transactions in your banking and business books?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

71 Motion denied.

Exception.

Q. And Mr. Johnson examined those books with yourself and your son?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What right did he have to examine your books, or how did he happen to examine your books at that time?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I asked him to do so.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. For what purpose, that is was he acting for himself or in a representative capacity, how was he acting?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. For his own information.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. For his personal information or for that of any one else?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

72 Overruled.

Exception.

A. Yes, sir; for his own personal information.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did he come down there representing himself personally or did he come there representing the Bank of Commerce?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

We object to the gentleman cross-examining his witness. He has stated positively.

Overruled.

Exception.

A. He was there in the interest of the Bank of Commerce.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Had you prior to this time, or at this time, had any business with Mr. Johnson personally or at this time, or was your business with him as a representative of the Bank of Commerce?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Bank of Commerce.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. And at this time he made an examination of your books showing all of your business transactions and the status of your business?

73 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Was it prior or subsequent to his examination of your books that he said to Mr. Evans one of the signers of this note that you were worth fifty thousand dollars over and above your liabilities?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff, and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Before signing the last notes.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. That is the notes sued on?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Then prior to Mr. Evans signing this note, or these notes, Mr. Johnson representing the Bank of Commerce examined your books, the books showing all of your transactions and your business status?

74 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And after that examination he made to Mr. Evans this statement?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff, and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. To which you have testified?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff, and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

75 Q. Was it before or after his examination of these books that you saw him talking with Mr. Lewis?

Objected to upon the ground that any conversation had with Mr.

Johnson is not binding upon this plaintiff, and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Afterwards.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Was it prior—did he make the examination of the books prior to the time when Mr. Lewis signed the notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Objection overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Then at the time that he had the conversation with Evans and at the time he had the conversation with Mr. Lewis and at the time he had the conversation with Mr. Pratt he knew or ought to have known the status of your business affairs as shown by your books?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Further objection, purely deduction of argument; pure deduction.

Sustained.

Exception.

76 Q. At the time that he had these conversations with these parties he had completed the examination of your books had he?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. And he had had two or three days' time in which to examine them?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Now Mr. Broyles you have stated that your bank was closed. In what condition is your business at this time including your banking business, is it in your hands or that of other parties?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Objection overruled.

Exception.

A. In other parties' hands.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. In whose hands?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

77      Exception.

A. In the hands of the Court of Mr. Schmidt as trustee.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What Court?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Motion denied.

Exception.

A. This Court.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Trustee you say. Do you mean trustee in bankruptcy?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Now these notes were signed on or about April the ninth?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of defendant's answer.

Motion denied.

78

*Motion denied.*

Exception.

Q. And it was on or about those dates that these statements were made by Johnson to these sureties, securities?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out, incompetent, immaterial and irrelevant; immaterial under the allegations of defendant's answer.

Motion denied.

Exception.

Q. Now Mr. Broyles were or were not your affairs, business affairs, and was or was not your financial condition the same at the time that Mr. Johnson made the examination of these books as it is at the present time?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Further objection that this is not primary evidence.

Sustained.

Exception.

A. The same.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Ask the answer to be taken from the jury.

By the COURT: Now a man's financial condition consists in his assets and liabilities. If the witness from memory can state the amount of his assets and liabilities I presume he can do so independent of any memorandum in the shape of books of account, but if it is sought to show specifically the status of this business at the time

of the signing of these notes and at the present it will have to be done by the best evidence.

Sustained.

Exception.

79 Ask it to be taken from the jury.

By the COURT: You will not consider the last answer of the witness.

Q. Mr. Broyles up to the time of the bringing of this suit by the Bank of Commerce who was in charge of your business?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

A. I was.

Move to strike out as incompetent immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Between the time when Mr. Johnson examined your books and the time when this suit was brought upon these notes had you disposed of any of your assets?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. No, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Up to the time of the bring- of this suit when you say that -ou had disposed of none of your assets.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. You have stated that you did not hear the conversation between Mr. Johnson and Mr. Lewis, I believe?

80 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. Did you hear any conversation between Mr. Johnson and Mr. Pratt concerning the signing of these notes?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff; and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I heard them talking among themselves; they were there quite a while. I did not hear the conversation.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Now as I understand you, Mr. Johnson brought these notes down to you and requested you to get security upon them and requested you to send for these parties and have them brought in there?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff; and that statements made by Johnson to Mr. Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

81 Q. Mr. Johnson at that time as I understand was representing the Bank of Commerce?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings, and that any conversation had with Mr. Johnson is not binding upon this plaintiff; and that statements made by Johnson to Broyles do not show or tend to show statements made to the defendants in this case.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you yourself at or about the time of the signing of these notes make any statement concerning your financial responsibility to Mr. Lewis, Mr. Johnson, Mr. Pratt, Mr. Brown, Mr. Evans or any of these other sureties?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. Who signed these notes first if you know?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Mr. Brown, Mr. Story for Schmidt and Story, Mr. H. Evans.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

82 Q. At the time Mr. Brown signed these notes were they in the form that they now are?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Exception.

Overruled.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Was the date when they were due at that time in the notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. They were in blank.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. At the time that Mr. Brown and these first signers signed these notes you say they were in blank?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. When was that blank filled up as to the time when they were due?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I do not know, sir.

83 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. At the time this note was signed by Mr. Evans or at the time, that time did you hear—you have testified to the statements that were made by Mr. Johnson as to your financial responsibility, at this time was there or not anything said at that time about the time for which these notes were to run?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff; and that statements made by Johnson to Mr. Broyles do not show or tend to show statements made to the defendants in this case. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Six months.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Who made that statement?

Objected to upon the ground that any conversation had with Mr. Johnson is not binding upon this plaintiff. Incompetent, irrelevant, immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Mr. Johnson.

Move to strike out as incompetent, immaterial and the defendant's answer.

Motion denied.

Exception.

Q. Was Mr. Evans present?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

84 Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Now as a matter of fact what collateral did the Bank have to secure the money evidenced by these notes?

Objected to as incompetent, immaterial and irrelevant and not in conformity with the pleadings. And the additional reason that it is immaterial.

Court in recess.

By DEFENDANT: Offer the stipulation and exhibits in evidence.

Dft's Exhibit "L"

Counsel for defendant here offer stipulation between the parties and the same is read to the jury.

Counsel for both plaintiff and defendant reserve the right to present the question of the relevancy or materiality of the facts stipulated hereafter in a motion to strike the same out.

By DEFENDANT: Gentleman of the Jury, for the purpose of facilitating the trial in this case there are certain facts which have been agreed upon by the counsel and at the direction of the Court I will read the stipulation.

Stipulation read.

Q. Now Mr. Broyles you have heard me read this stipulation and it appears that on November 8th, you had a note with the Bank of Albuquerque for \$25,000, that was on November the eighth; it also appears from this stipulation that on November 20th, you forwarded to the bank three notes—\$10,000; two for \$10,000 each, one for \$5,000, making \$25,000. That was on November the 20th. Now how long had you had notes in the Bank for the amount of \$25,000, prior to November 20th, approximately?

Objected to and reserved.

Counsel for plaintiff reserves objection as to all these questions as to the competency and relevancy of the testimony.

Overruled.

Exception.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

85 Overruled.

Exception.

Q. How long prior to November 20th, Mr. Broyles, had you had a note in that bank for \$25,000.

Same reservation.

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Something over one year.

Motion to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Whose note was it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. My own.

Motion to strike out as incompetent immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Any security on it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. No, sir.

Motion to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Then this note that is referred to on November 8th was your personal note for \$25,000.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

86      Exception.

A. Yes, sir.

Motion to strike out as incompetent, irrelevant and immaterial. Immateral under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Now these notes of November 20, \$25,000 that you sent to the Bank on that date. What were they intended for?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. To take up my old note for same amount.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Then on November 20, you sent the Bank two notes for ten thousand dollars each and one note for five thousand dollars to take up your old note?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Now these last three notes that were sent in on November the 20th, were they signed by any one else but your self?

Same reservation.

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir.

87 Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Do you remember by whom they were signed?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Mr. Anderson.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of defendant's answer.

Motion denied.

Exception.

Q. You mean by Anderson the defendant Mr. Platt?

Objected to as incompetent, irrelevant and immaterial; not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir; Mr. Evans, Mr. Brown. I believe that was all.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. And those notes which you sent in there were to take up your own personal note which had been there, or the renewal which had been there for over a year, the original or the renewal of the original which had been there for over a year?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

88 Exception.

Q. At the time that you sent—that you had this note—these notes of November 20th signed by these parties whom you have mentioned, how did you happen to secure their endorsement; how did you happen to ask them to sign the notes?

Objected to as irrelevant, incompetent and immaterial; or any statement or conversation had by Broyles with the parties, the bank or the representative of the bank not being present would not be binding upon the plaintiff, and not in conformity with the pleadings.

Overruled for the present.

Exception.

And for the further reason that if it was in writing the letter was the best evidence.

Objection overruled.

Exception.

A. By request of the Bank of Commerce.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Cross-examination.

By JAMES FITCH, Esq.:

Q. Mr. Broyles look at these notes in suit here and say if as a matter of fact those notes were not made in Albuquerque as re-

newals of the notes given November 20th, signed by yourself and Brown and Anderson and Evans?

Objected to. Already covered by the stipulation.

Overruled.

Exception.

A. Yes, sir.

Q. State whether it is not a fact that those notes — taken by you to San Marcial or sent down to you to San Marcial, and that you procured the signatures of Franz Schmidt and Story and Charles W. Crossman and E. W. Brown to those notes before Mr. Johnson came there?

A. I think he was there at the same time.

Q. Is it not a fact Mr. Broyles that after you had procured  
89 their signatures that you sent those notes back to Albuquerque or took them back to the Bank and that then Mr. Johnson came down with them and told you that he wanted the signatures of the parties who were on the old notes, that is Anderson and Evans?

A. Yes, sir; he asked me to go get two other men.

Q. Well, is it not a fact that after you got these first three signatures under your own there you sent or took those notes back to the Bank?

A. I do not know whether I mailed them to him or Mr. Johnson taken them back. I do not remember.

Q. Do you mean to say Mr. Johnson was down there twice?

A. He was down there three or four times.

Q. Do you recall when he looked over your books as you say?

A. Don't remember the date.

Q. Is it not a fact that the time that you claim he looked over your books that it was in February when he was down there in altogether different matter?

A. It was before those notes were given.

Q. Before they were drawn up at all?

A. Before *this* last renewals were given, about that time.

Q. Will you swear now when he was down there at the time you took —

A. I do not remember the date exactly.

Q. As a matter of fact wasn't it on February 28th?

A. I could not say the date Mr. Fitch.

Q. Can you say or not?

A. No, sir; I have no memorandum with me.

Q. But you say it was before these notes were made out?

A. Before they were signed, yes, sir.

Q. Wasn't it before they were made out that he made this examination as you have stated?

A. I do not remember. I do not know.

Q. Is it not a fact that he was only down there once with regard to obtaining these notes in issue?

A. He was there several times. I do not know.

Q. You cannot say whether he was down there once or twice can you?

90 A. He was there three or four times in regard to this note business.

Q. Are you positive about that Mr. Broyles?

A. Yes, sir.

Q. Look at these notes again ; is it not a fact that you signed those notes in Albuquerque with the same ink in which they were filled in?

A. No, sir; I didn't in Albuquerque.

Q. You didn't get those notes in Albuquerque?

A. No, sir.

Q. Say who signed that note after you, the first party there?

A. Mr. Story for Schmidt and Story.

Q. Well was Mr. Johnson there when they signed it?

A. I do not remember. I think he was.

Q. Now do you recollect surely?

A. I do not remember, No, sir.

Q. Who signed it next?

A. Mr. Crossman.

Q. Was Mr. Johnson present when Crossman signed it?

A. I do not remember, Sir.

Q. Who signed it next?

A. Mr. Brown.

Q. Was he present when Mr. Brown signed it?

A. I do not remember.

Q. You do not remember very much about this do you Mr. Broyles?

A. The last two signatures were signed in the presence of Mr. Johnson.

Q. Answer my question. You do not remember very much about this do you?

A. They were signed in my presence.

Q. What were the last two signatures, if they were signed in the presence of Mr. Johnson?

A. Mr. Anderson and Mr. Lewis.

Q. How long did they sign after Schmidt and Story and Crossman and Brown?

A. A few days I do not remember the days.

Q. Do you mean to say Johnson was there all that time?

A. No, sir.

Q. Mr. Broyles is it not a fact that you told Mr. Dougherty—is it not a fact that you told Mr. Dougherty in his office during the present term of court that Mr. Johnson said nothing whatever in your presence to any of these defendants about what you were worth or whether you were solvent or not?

A. No, sir.

Q. Didn't you make that same statement to me on Court Street when I asked you about it?

A. No, sir.

Q. Is it not a fact Mr. Broyles that you told me that you had heard that Mr. Johnson had told somebody before he left on the train that night that he thought you was all right or words to that effect; didn't you tell me that?

A. No, sir.

Q. Is it not a fact that you told me that that was all you knew about Mr. Johnson making any statement down there at all as to your financial responsibility?

A. No, sir.

Q. Is it not a fact Mr. Broyles that when Evans came to sign this note that you introduced him to Mr. Johnson and that he then went up and signed the note without any other remarks except to say in substance that you had helped him and he was willing to help you out when you was in a tight place?

A. He signed the note, Yes, sir.

Q. Is that true what I have asked you there or not?

A. I do not remember what he said.

Q. Is it not a fact that he signed that note within two minutes after he came into the room?

A. He talked with Mr. Johnson some and then signed the note.

Q. Is it not a fact that his only conversation with Mr. Johnson was an introduction?

A. They had some conversation.

Q. Do you remember what that conversation was?

A. No, sir.

Q. Why did you go on in your direct examination and give all this conversation about what Johnson told Evans at that time if you didn't hear it?

A. Well I heard what was said. Mr. Johnson and Mr. Evans was talking among themselves; because I heard what was said when Mr. Johnson and Mr. Evans was talking among themselves.

92 Q. You just said now that you did not hear it?

A. Yes, sir; I said I heard them talking.

Q. Well did you hear what was said between Mr. Johnson and Mr. Lewis?

A. No, I heard them talking but I paid no attention.

Q. Did you hear what was said between Mr. Anderson?

A. Heard them talking on the same line.

Q. Did you hear them, what was said?

A. Not the whole conversation. No, sir.

Q. You say you did not have any conversation with Lewis at all?

A. No, sir.

Q. As a matter of fact you brought Lewis in there didn't you from outside?

A. Well he came in there. Yes, sir; I asked him to sign this note.

Q. You brought him in didn't you; came in with him?

A. Sent for him.

Q. And came into the room with him where Mr. Johnson was?

A. Yes, sir.

Q. And you asked him to sign this note?

A. Yes, sir.

Q. And he signed it did he?

A. Yes, sir.

Q. Immediately?

A. Yes, sir.

Q. After that he had some conversation with Mr. Johnson didn't he?

A. Yes, sir.

Q. And then that was after he had signed the note was it?

A. Yes, sir.

Q. And how about Anderson?

A. They talked for some time there.

Q. You sent for Mr. Anderson didn't you?

A. Yes, sir.

Q. He came in there and you asked him to sign the note?

A. Yes, sir.

Q. Well what did he say about it?

A. He signed the note.

93 Q. And afterwards he had some conversation with Mr. Johnson?

A. Before or after.

Q. What did he say before signing the note?

A. I do not know.

Q. You did not hear it then?

A. I heard it but I paid no attention to their conversation.

Q. Well how about Mr. Lewis, you sent for him to sign that note didn't you?

A. Yes, sir.

Q. Well he came in there?

A. Yes, sir.

Q. Did you ask him to sign the note?

A. Yes, sir.

Q. And he signed it?

A. You asked me the same question about Lewis twice.

Q. I have asked you about Anderson and now I asked about Lewis.

By Mr. HOLT: He asked the same question about Lewis a moment ago.

Q. You introduced Mr. Lewis to Mr. Johnson?

A. Don't think I did.

Q. Wasn't Johnson a stranger to all these men?

A. I do not know, sir.

Q. Did you introduce him to Evans?

A. I do not remember.

Q. You introduced him to Mr. Anderson didn't you?

A. I do not remember whether I did or not.

Q. Don't you as a matter of fact know that Mr. Johnson was an entire stranger to all of these men?

A. No, sir; he had been there several times and he was acquainted with about all of them, all the ranchmen.

Q. Where do these men live?

A. Near San Marcial.

Q. How near?

A. From 15 to 35 miles.

Q. As a matter of fact these men are not in town once a week are they?

A. Yes, sir.

Q. They are every day.

A. No, sir.

94 Q. Now Mr. Broyles I will ask you, Mr. Broyles if the J. P. Anderson who signed this note is not the same J. P. Anderson who signed the note for which these were given in renewal of the notes?

A. Yes, sir.

Q. I will ask you if H. Evans who signed this note is the same man who signed the other notes for which there were given in renewal?

A. Yes, sir.

Q. I will ask you if E. W. Brown who signed these notes is not the same man who signed the notes for which they were given in renewal?

A. Yes, sir.

Q. Is it not a fact Mr. Broyles that Schmidt and Story and Crossman and Brown—that Schmidt and Story and E. W. Brown, Anderson and Lewis, or some of them, also went on your note subsequent to this to L. B. Putney for sixteen thousand dollars?

Objected to as incompetent, irrelevant and immaterial.

Overruled.

Exception.

A. Yes, sir.

Q. You are under indictment here at the present term of court are you not?

A. Yes, sir.

Q. Are not all these parties on your bond?

Objected to as incompetent, irrelevant and immaterial.

Overruled.

Exception.

A. Yes, sir; some of them.

Q. Who are they?

A. Mr. Crossman I believe. I do not remember their names now.  
Mr. Anderson and Mr. Brown.

Q. Was Schmidt and Story?

A. No, sir.

Q. Or either of them?

A. Don't think so.

Q. Is Lewis on your bond?

A. He may be. I do not remember.

Q. Is Evans on your bond?

95 A. No, sir.

Q. Mr. Broyles haven't you repeatedly represented yourself as solvent?

A. No, sir.

Q. Never did?

A. No, sir; I always thought that I had more than I owed sure, yes, sir; never did talk about it you know.

Q. On the occasion when you say Mr. Johnson made an examination of your books is it not a fact that you yourself gave him the figures as to the value of your real estate?

A. He consulted me, making up the statement himself.

Q. Please answer my question Mr. Broyles.

A. I gave him the values of the different houses.

Q. You gave him the values of your stock of merchandise did you?

A. I guessed at it, yes, sir.

Q. Stated your stock was thirty-five thousand dollars didn't you?

A. Twenty-five thousand I think.

Q. Are you certain about that?

A. No, sir; I am not sure.

Q. If Mr. Johnson took down your statements at that time and it shows that your statements was \$35,000, that is correct is it not?

A. No, I do not know sir. I do not know what I put down. I knew.

Q. Well you gave him that; did you give him the value of your real estate in San Marcial?

A. I gave him the value of different properties. I do not know how much it amounted to.

Q. You have been claiming right along prior to this bankruptcy that your property there, real estate, was worth from forty to forty-five thousand dollars, haven't you?

A. The bookkeeper, expert bookkeeper from Putney made it that.

Q. Answer my question please now.

By Mr. FITCH: Move to strike that out.

Sustained.

Exception.

Q. Answer my question; haven't you been claiming right along that your real estate was worth over forty thousand dollars?

96 A. About forty thousand.

Q. Well that was your honest estimate of it wasn't it?

A. Yes, sir.

Q. Didn't you inform Mr. Johnson at that time that you had credits amounting to \$1,800 with other banks?

A. No, sir.

Q. You sure you didn't do that?

Objected to unless it is shown that Mr. Johnson stated to these witnesses that his information upon which he said that Mr. Broyles was worth over fifty thousand dollars came from Mr. Broyles himself. Incompetent, irrelevant and immaterial.

Overruled.

Exception.

Court adjourned until nine o'clock Wednesday morning, July 1st.

Q. Mr. Broyles I will ask you if at the time when you say you and Mr. Johnson and your son made an examination of your books

and accounts, I will ask you how the amount of your bank deposits were arrived at?

A. Mr. Johnson looked through the books.

Q. Is it not a fact that he looked through the books, called off the different items and your son took them down on the typewriter?

A. Yes, sir.

Q. I will ask you how your liabilities for merchandise were ascertained?

A. In the same way; looked through the accounts.

Q. Is it not a fact Mr. Broyles that it was not in the same way but you made the statement to him in effect that your liabilities for merchandise for \$2,000?

A. No, sir.

Q. You sure of that?

A. Yes, sir.

Q. How was that arrived at then?

A. He looked through our books and got the accounts himself.

Q. And put the amounts down?

A. Yes, sir.

Q. How did he determine the amount that you owed the State National Bank.

97 A. I told him the amount of the mortgage.

Q. Is it not a fact Mr. Broyles that your books don't show and did not show at that time the amount you were owing for merchandise?

A. In the invoice it shows all.

Q. Did you show the invoice book to him?

A. It was there for his inspection.

Q. Did you show it to him?

A. Yes, sir; it was there on the counter.

Q. Did he look at it?

A. Yes, sir.

Q. You say you mentioned the mortgage to the State Bank at that time?

A. Yes, sir.

Q. How was the amount of the stock in your store arrived at?

A. We guessed at it from the invoice taken six months ahead.

Q. And was your mill property and other properties at San Marcial how was the value of them arrived at?

A. Each property was listed for so much.

Q. Who fixed the value?

A. I did.

Q. How was the amount due you from cor-espondent banks arrived at?

Same objection made to all these questions as made to the original question. Same objection is made to all this line of examination which was made to the original question along this line.

Overruled.

Exception.

A. Shown from the balance due them from our remittance book.

Q. Is it not a fact Mr. Broyles that your books at that time didn't show and do not show just what was due you from other banks?

A. Yes, sir, they do show it.

Q. How was the value of the wood in the mill arrived at?

A. Guessed at.

Q. You did guess did you?

A. Yes, sir.

98 Q. Where you say you did the guessing did you mean to say that you made the best estimate you could or that you were giving Mr. Johnson any old figure that came into your head?

A. Used my best judgment to the amount of wood on hand.

Q. And the same is true about the merchandise on hand wasn't it?

A. Yes, sir.

Q. How was the amount due you on open accounts of merchandise arrived at?

A. From the grocery ledger.

Q. Well did you read off the figures from that grocery ledger?

A. Mr. Johnson did.

Q. And your son took them down?

A. Yes, sir.

Q. Who footed them up?

A. My son on the adding machine.

Q. How were the amounts of the over drafts on the bank arrived at?

A. From the same books, remittance books.

Q. How were the amounts of the notes that you held then arrived at?

A. Were footed up.

Q. Who footed them up?

A. Mr. Johnson and my son.

Q. Is it not true that you made the estimate of the amount of notes you had on hand and gave it to Mr. Johnson?

A. No, sir.

Q. How about the old accounts and interest account?

A. The account in the Chicago Collecting Agency's hands do you mean?

Q. I do not know; you had an old account didn't you, and interest account?

A. Yes, sir.

Q. How was that arrived at?

A. We have a list there showing the names, amounts and old accounts delivered to the Chicago Agency for collections that we considered doubtful, about thirteen thousand dollars.

99 Q. That was taken directly from the account from the list?

A. From the itemized list in the contract with them.

Q. Mr. Broyles in going over and trying to make this estimate with Mr. Johnson were you acting honestly or not?

A. Yes, sir.

Q. You were trying your best to arrive at the amount of your assets and liabilities were you not?

A. Yes, sir.

Q. Now what did you find as a result of that examination your assets amounted to?

A. I do not remember the amount.

Q. You mean to say—

A. I think it was about forty thousand somewhere.

Q. Of your assets?

A. Yes, sir. I am not sure. I am not positive to that.

Q. You remember how much your liabilities footed up to?

A. No, sir; Mr. Johnson kept the statement to himself.

Q. Well you were there when you were making it?

A. Yes, sir.

Q. You saw the result didn't you?

A. He never showed me the result.

Q. Didn't tell it to you at all?

A. No, sir.

Q. What were you doing, were you not figuring on it too?

A. No, sir; I didn't do any figuring nor footing.

Q. Now is it not a fact Mr. Broyles that at and before this time you had represented to the bank that you were worth—that you were solvent?

A. I don't think I had.

Q. Never did did you?

A. I thought I was all right, yes, sir.

Q. Didn't you tell the bank so?

A. I think so.

Q. Didn't you tell them before this time that you were worth one hundred thousand dollars over and above your debts and liabilities?

A. No, sir.

100 Q. Never did that?

A. No, sir.

Q. Didn't you also inform the bank at the same time that twenty thousand dollars would pay all your debts?

A. The most urgent debts, yes, sir.

Q. Didn't you tell them that that would pay every cent that you owed, or words to that effect?

A. No, sir.

Q. Didn't you on October 28th, 1907, in a letter to the bank say to them, didn't you state I will run over one hundred thousand dollars net worth, in a communication to the bank of that date?

Object to statements made in October, 1907. Incompetent, irrelevant and immaterial.

Objection withdrawn.

Q. Did you or did you not make that statement?

A. What year was that?

Q. 1907.

A. I do not remember.

Q. Well look at that letter and see if it is not written by you and refresh your memory and say whether you did or not.

A. That was in last year, yes, sir.

Q. Then you were mistaken in saying that you didn't make such statement to the Bank were you Mr. Broyles?

A. Yes, sir.

Q. Mr. Broyles did you not on the date of this examination of your books state to the bank in writing that twenty thousand dollars will pay every cent I owe; have that due me from merchandise and bank accounts that are as good as gold?

A. I think so. I do not remember the date.

Q. Look at that letter and see if it will refresh your memory.

A. Yes, sir.

Q. The date was February 28th, wasn't it?

A. 18th. Yes, sir; 28th.

Q. Twenty-eighth?

A. Yes, sir.

Q. Didn't you in a letter to the Bank at about the time of this examination state that you have nearly thirty thousand dollars in stock and twenty thousand dollars good book accounts and 101 this alone would over-pay all I owe?

A. I think so.

Q. Were those statements made to the Bank in good faith or not Mr. Broyles?

A. My best judgment, yes, sir.

Q. Mr. Broyles is it not a fact that about a week after these notes in suit were given that you had an examination of your books and affairs made by an expert bookkeeper sent down there by Mr. Putney?

A. Yes, sir.

Q. And you helped him?

A. No, sir. I didn't.

Q. Show him the books?

A. Yes, sir.

Q. Give him the prices or value of your real estate?

A. Yes, sir; guessed at it.

Q. You mean by guessed you gave what you thought was a fair estimate, didn't you?

A. Yes, sir.

Q. Same way with stock is it not?

A. I answered that question.

Q. I asked you about real estate.

A. Yes, sir.

Q. Well you gave him your books and you helped him didn't you or your son?

A. No, sir.

Q. You mean to say you simply turned the books over to him?

A. Yes, sir.

Q. And without saying a word or pointing out any items or anything?

A. He had charge of the books.

Q. Well did you help him in anything?

A. No, sir.

Q. You were familiar with these books were you not?

A. Yes, sir.

Q. And he had never seen them before?

A. No, sir. I gave him the books.

Q. And he had never seen them before?

A. No, sir.

Q. You mean to say you didn't attempt to point out or  
102 explain anything in those books to him when he was going  
over them?

A. No, sir.

Q. Is it not a fact Mr. Broyles that as a result of that examination  
it was ascertained that you had assets to the amount of about one  
hundred and fifty thousand dollars and liabilities to the amount of  
about one hundred thousand dollars?

A. I think something like that. I do not remember the amounts.

Q. Is it not a fact that you were claiming after that examination  
and as a result of it that you were worth fifty thousand dollars over  
and above all debts and liabilities?

A. Some one reported that amount, I didn't.

Q. Didn't you claim to numerous parties about that time that you  
were worth fifty thousand dollars over and above all debts and lia-  
bilities?

A. I think it was forty thousand.

Q. Did you claim to be worth forty thousand at that time?

A. I claimed that, yes, sir.

Q. You believed it did you?

A. Yes, sir.

Q. Mr. Broyles is it not a fact that you didn't go into bankruptcy  
until several weeks after this suit was brought?

A. Yes, sir; in bankruptcy, yes, sir, but I turned everything -to  
Mr. Schmidt's hands as trustee, receiver, by your request.

Q. Mr. Broyles will you recollect about that, that all you did was  
to give Mr. Schmidt a power of attorney to carry on your business?

A. Yes, sir; and keys and possession of everything.

Q. Mr. Schmidt was one of the makers of this note is he not,  
surety?

A. Yes, sir.

Q. Was that as a result of this suit that you appointed Mr. Schmidt  
your attorney?

A. I could not tell you the result the cause of the suit; they  
brought suit right away.

Q. Was it because of this suit that you did it, because this suit  
had been commenced against you that you appointed Mr.  
103 Schmidt as your attorney?

A. No, sir; it was your request.

Q. I advised you didn't I Mr. Broyles?

A. Yes, sir; same thing.

Q. Now just be fair to this; you employed me and it was after a  
consultation with the defendants in this suit that the appointment  
of Mr. Schmidt was made and with their consent wasn't it. Don't  
you recall we were present there at San Marcial and also Mr.  
Dougherty as representing the Bank?

A. This meeting was before they brought the suit.

Q. Yes, sir; and it was with the consent and advice of these defendants in this suit wasn't it?

A. They threatened to bring suit if we didn't get two more good signatures in the place of Schmidt and Story.

Move that this answer be stricken out.

By the COURT: It is not responsive.

Motion sustained.

Exception.

Question repeated.

Q. Now just be fair to this; you employed me and it was after a consultation with the defendants in this suit that the appointment of Mr. Schmidt was made and with their consent wasn't it. Don't you recall we were present there at San Marcial and also Mr. Dougherty as representing the Bank?

A. It was before the meeting. Consent of whom; whose consent?

Q. Of these defendants.

A. Why they wasn't there.

Q. You mean to say Mr. Schmidt wasn't there?

A. In our meeting?

Q. Yes, sir; that night.

A. Yes, sir; I think Mr. Schmidt was there.

Q. How about Mr. Crossman?

A. Don't remember whether he was there or not.

Q. How about Charles Lewis?

A. I think he was there. I do not remember who was there now.

Q. How about Mr. Evans?

A. Don't think he was there.

Q. He was in town that day do you recall?

104 Q. A. No, sir; don't remember seeing him.

Q. So when you stated on your direct examination that it was because of this suit that you appointed Mr. Schmidt your attorney and agent that statement wasn't true was it?

Objected to. That statement wasn't made.

By the COURT: The easiest way is to interrogate him whether he made that statement on the direct examination.

Q. Mr. Broyles, if I understand you, you testified that you went into bankruptcy on account of this suit being brought, is that true?

A. That was part of it, yes, sir.

Q. Is it not a fact Mr. Broyles that you were forced into bankruptcy by Albuquerque creditors and not by the Bank of Commerce here?

A. They made a request but I, we fought it and afterwards gave up to go into bankruptcy.

Q. And three of these defendants, men who signed this note joined in that proceeding and asked that you be declared a bankrupt didn't they, Mr. Broyles?

A. One I think was all I know of.

Q. Didn't Mr. Franz Schmidt?

A. Yes, sir; so I understand. I do not know sir.

Q. Didn't Charles Crossman?

A. I do not know.

Q. Now then when you stated that you were forced in bankruptcy by reason of the proceeding brought by the Bank of Commerce, the facts are that the proceeding was brought by Albuquerque creditors and joined in by three of these very defendants that forced you into bankruptcy, is not that true?

A. Mr. Schmidt was all I know.

Q. And you don't know whether the others did or not?

A. No, sir.

Q. Mr. Schmidt one of the defendants here?

A. Yes, sir.

Q. And the Bank of Commerce had nothing to do with the proceeding did they?

A. I think all of them had something to do with it, the Gross Kelly and the Bank of Commerce altogether.

Q. Do you mean to say that the Bank of Commerce had anything to do with that bankruptcy proceeding?

105 A. I think so.

Q. Do you mean to swear they did?

A. I think so only.

Q. You have been swearing to considerable that you thought and very little that you know in this whole case haven't you Mr. Broyles?

A. I am telling the truth as far as I know.

Q. Well there is a whole lot of things you are very doubtful about knowing are there not?

A. I have so stated.

Q. But you do know that Gross Kelly and Franz Schmidt, one of the defendants, were the parties to that bankruptcy proceeding?

A. Well the case came up, yes, sir, in that way.

Q. The case came up at Las Cruces?

A. Yes, sir.

Q. Wasn't Franz Schmidt the only witness against you there?

A. I wasn't in the court room at the time he give his evidence; I do not know sir.

Q. He is the only one you saw in Las Cruces that day connected with this is he not?

A. Yes, sir.

Q. You didn't see Mr. Johnson there?

A. No, sir.

Q. At the time that these notes which have been introduced in evidence here Mr. Broyles were delivered, state whether or not afterwards the old notes were surrendered back to you?

A. They were returned to me, the old notes, yes, sir.

Q. Where are those notes now?

A. Destroyed.

Q. Who destroyed them?

A. I did.

Q. Those were the notes that were signed by yourself, by Evans,

by Brown, by Anderson, otherwise known as Pratt, are those the ones?

A. Yes, sir.

Q. And when the Bank gave them back to you you destroyed them?

A. Yes, sir.

106 Redirect examination.

By Mr. HOLT:

Q. Mr. Broyles at the time of this conversation which you testified about on cross-examination between you and Mr. Fitch and others concerning your financial condition you say Mr. Fitch was acting as your attorney?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you say also that it was by his advice that you appointed Mr. Franz Schmidt as your agent to handle your business?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. At the time you appointed Mr. Schmidt as your agent for that purpose did you execute to him a power of attorney, did you testify to that also?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

107 Exception.

Q. Who drew that power of attorney?

Objected to as incompetent, immaterial and irrelevant and not in conformity with the pleadings.

Overruled.

Exception.

A. Mr. Fitch.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you send out any circular letter to your creditors informing them of the action which you had taken?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Who prepared that letter?

Objected to if the gentleman is trying to embarrass the position of counsel. A statement of counsel himself has been freely made that he was counsel up to that time and had nothing to do with this case. The question asked as to who drew these different things can have no possible bearing on this case except for the purpose of embarrassing counsel. Counsel has freely stated his position in the beginning that he was counsel for Mr. Broyles but had nothing to do with this case. Incompetent, irrelevant and immaterial and prejudicial.

By the COURT: Absolutely immaterial and has nothing to do with this case.

Exception.

Jury withdrawn.

By Mr. FALL: The defendants expect by the line of examination now being indulged in on re-direct examination to develop 108 the fact, and by other evidence in the case which they will offer following up this same line, that Mr. Broyles was not only acting under the advice of counsel at the time of this meeting which he has testified to, but that the defendants in this case were also advised by the same counsel, Mr. Fitch, at that time to allow Mr. Broyles to do what counsel advised Mr. Broyles he should do for the very purpose of avoiding bankruptcy. That in pursuance of that advice Mr. Broyles sent a letter out to his creditors dated on April 22nd, which letter was drawn by his counsel who had at the same meeting advised the defendants in this case, and that the entire purport of the letter is to avoid bankruptcy. That following

this the counsel for Mr. Broyles again wrote a letter to the defendants in this case advising them of the bringing of the suit in this case by the Bank of Commerce and what he thought they should do after the bringing of the suit. That he thought they should take no steps but should still abide by the decision arrived at under his advise in this meeting at San Marcial. We propose to offer the evidence of Mr. Broyles upon this subject and the evidence of the other defendants and the letters, the circular letter issued under the advise of counsel, and the letter of Mr. Fitch to Mr. Franz Schmidt, the attorney in fact, who was in possession of Mr. Broyles' property and apparently representing his co-sureties, dated at Socorro on April 22nd, 1908. The offer of this evidence and of the other testimony along this line is for the purpose of showing that Mr. Broyles and these sureties were attempting under the advise of counsel to avoid bankruptcy, and that under that, bankruptcy proceedings never entered the minds of any of these parties. This line of evidence is not for the purpose of showing that the Bank of Commerce was a party to the proceedings in bankruptcy, but to show that the act of the Bank of Commerce in bringing the suit caused the bankruptcy proceedings to be commenced by the other creditors of Mr. Broyles, showing bankruptcy proceeding was sought to be prevented by Mr. Broyles and these defendants under the advice of Mr. Fitch and it is competent.

Jury brought in.

By the COURT: Gentlemen of the Jury, the witness Broyles  
109 was examined in direct examination as to whether the bringing of this suit caused the proceedings in bankruptcy to be brought against him. Now gentlemen of the jury, this witness has been examined both on direct and cross-examination as to what caused the closing of his bank and as to the fact that it is now in the custody of other persons. None of this testimony is material and you will not consider any of it.

Exception to withdrawing, by the Court, of the answer of the witness to the question propounded on direct examination—as to the answer and the question propounded on direct examination which answer the witness states that his bank was closed because of the bringing of this suit and other claims; also an exception to the Court not directly stating to the jury that the evidence drawn out on cross-examination by the counsel as to what took place between Mr. Fitch and Mr. Broyles and particularly as to what took place in the presence of these sureties at San Marcial between Mr. Broyles from the jury. In fact all of the cross-examination of this witness upon all these subjects.

By the COURT: I will further say that this testimony elicited on cross-examination as to what occurred at the meeting in San Marcial at which Mr. Fitch and Mr. Dougherty and part of the defendants were present is withdrawn from your consideration.

By Mr. HOLT:

Q. Mr. Broyles in your cross-examination counsel exhibited to you and interrogated you regarding a letter purporting to have been

written by you to the Bank of Commerce under date of October 28th 1907, is this the letter which they exhibited to you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

110      Exception.

Q. I will ask you if it is not a fact that you said in your letter as follows, "my last invoice runs over one hundred thousand dollars net worth"; is that not the language which you used in the letter?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Now in another letter purported to have been written by you to the plaintiff Bank on February 28th, of this year, which was exhibited to you by counsel for plaintiff and about which he interrogated, I will ask you if this language occurs, the letter being addressed to Mr. W. S. Strickler, Bank of Commerce, Albuquerque. "Now sir I am having the hardest time of my life to keep above the water; want you to discount all the notes you hold as collateral; balance up my over draft account and credit balance on my \$25,000 notes and return to me paid." Does that language occur in that letter?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Moye to strike out as incompetent, immaterial, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

We offer both letters in evidence.

Marked Exhibits "2" and "3."

Q. Mr. Broyles at the time when Mr. Johnson came down and went through your books, examined into the condition of 111 your business I understood you that was at the time when these signatures to the notes sued on were procured.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

Objected to because the gentleman stated that he did not know.

Q. Is that correct?

A. Yes, sir.

Move to strike out as incompetent, immaterial, irrelevant and immaterial under the allegations of the defendant's answer.

Q. How many trips prior to that time had Mr. Johnson made to San Marcial with reference to your account in the Bank of Commerce?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Two or three times.

Move to strike out as incompetent, immaterial, and irrelevant, immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. These notes sued on were obtained about the ninth of April were they not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Was Mr. Johnson down there during the month of March?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

112 Overruled.

Exception.

A. I think so, yes, sir. I think so.

Move to strike out as incompetent, immaterial, and irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Was the other during the month of February?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial, and irrelevant, immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Was the other during the month of December, 1907?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Objection overruled.

Exception.

A. I could not say.

Move to strike out as incompetent, immaterial, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Upon any of those previous trips, that is the trips made prior to the time when he examined your books and accounts did he take from your bank for the Bank of Commerce any collateral which you had in your bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Additional objection upon the ground that what he did in December or at any prior time prior to the signing of the notes and taking of collateral is irrelevant and incompetent and has nothing to do with this case.

113 Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did he upon the occasion when he took that collateral from your bank go through your bills receivable or the notes payable to

your bank and select such collateral as the Bank of Commerce desired?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

In addition to the general objection that has been continued by the Court to all this line of examination we wish to interpose the same objection made to the last question and the additional objection as to what they did in previous trips, time not being fixed or place fixed, and not in any way tending to show any knowledge as to the condition of the defendant Broyles on April 9, 1908; and further upon the ground that the question is leading.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Q. Mr. Broyles had you in your banking business maintained close business relations with the Bank of Commerce for a considerable period of years prior to the time when the notes sued on were obtained?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Continue the same general objection and in addition the objection that it is not proper re-direct examination. Nothing brought out as to the relation of those parties.

114 By the COURT: You may re-introduce the witness if there is any question about it.

By DEFENDANT: I will reserve the right to recall him for that purpose a little later when we have concluded with the re-direct examination. Probably want to recall him for some other questions which we overlooked on direct.

Q. Now Mr. Broyles, Mr. Fitch upon cross-examination asked you if it was not a fact that after Mr. Johnson had examined your books you had reported around the streets of San Marcial that you were worth fifty thousand dollars over and above your debts and liabilities, to which question you replied—

Question stricken out.

Q. Mr. Fitch in cross-examination asked you in substance if it was not a fact that some time after Mr. Johnson had examined your books you had reported around San Marcial that you were worth fifty thousand dollars over and above your just debts and liabilities and you replied in substance that you didn't so report but you believed that others had done so. Now who with reference to the time Mr. Johnson examined your books made such statements upon the streets of San Marcial?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

And the further objection. This gentleman was asked upon cross-examination as to whether he had made reports of this kind, the reply was entirely incompetent and which we asked to strike out that he had understood that others had so said. Then upon further cross-examination after repeatedly pressing upon him the question as to whether he hadn't said, he said that he represented that he was worth forty thousand dollars. It was not in response to any question. He would not answer and it was only after repeated reading. Incompetent. He has not correctly stated the question.

Objection sustained. The testimony if admissible, for other reasons would be hearsay.

Exception.

Q. After Mr. Johnson had examined your books Mr. Broyles did he make any statement within your knowledge to the effect  
115 that you were worth that amount of money?

Objected to upon the ground of its not being part of the res gestæ.

Q. I will add to the question. And before the signing of these notes sued on by some of the defendants?

That does not aid his question at all. The question is as to the signing of the notes; the res gestæ is the signing of these notes. Under no construction of law is any declaration of the agent after the act itself is completed binding upon the principal. Now as to what he said after the signing of the notes whether the next day or not is not part of the res gestæ.

By the COURT: The question has been modified to be before.

Move to strike out the first part and the last part objected to because he has gone into it upon direct examination as to what Mr. Johnson said to these defendants.

Objected to as to any statement which he made before the signing of the notes which was not made to the defendants in the case would not be binding, and as to any statement made after would not be binding as not constituting part of the res gestæ and the general objection as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Objection sustained.

Exception.

Q. Mr. Broyles at the time the notes sued on were signed and delivered to the Bank of Commerce did that Bank or not hold the collateral which is listed in the letters attached to the stipulation in this case as shown by letters of Mr. Strickler the vice president and cashier of the bank, dated March 11, 1908, and May 18, 1908?

Same general objection as incompetent, irrelevant and immaterial and not in conformity with the pleadings. And the question as to any collateral I fail to see how it is material whether they held it outside of what our stipulation has already provided for. Not proper re-direct examination.

By the COURT: It is admitted that this is not proper re-direct  
is it?

116 By Mr. Holt: I think it is not.

Ask leave, if the Court please, to recall the witness at this  
time for the purpose of propounding this question just propounded  
and a few other questions.

By the COURT: It will be allowed.

Witness recalled by Mr. Holt.

Q. Mr. Broyles at the time the notes sued on were signed and  
delivered to the Bank of Commerce did that Bank hold the collateral  
which is listed in the letters attached to the stipulation in this case  
as shown by letters of Mr. Strickler, the vice president and cashier of  
the bank, dated March 11, 1908, and May 18, 1908?

Objected to as incompetent, irrelevant and immaterial and not in  
conformity with the pleadings.

OVERRULED.

Exception.

A. Yes, sir.

Motion to strike out as incompetent, immaterial, and irrelevant;  
immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did or did not the Bank of Commerce plaintiff in this suit,  
hold that collateral at the time this suit was brought?

Same general objection incompetent, irrelevant and immaterial  
and not in conformity with the pleadings. And further as being  
entirely immaterial as to whether they held it or not.

OVERRULED.

Exception.

A. Yes, sir.

Motion to strike out as incompetent, irrelevant and immaterial; im-  
material under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. If you know, state whether or not the collateral referred to is  
still in the possession of the Bank of Commerce.

Same objection. Incompetent, irrelevant and immaterial and  
not in conformity with the pleadings. And further as being  
117 entirely immaterial as to whether they held it or not.

OVERRULED.

Exception.

A. Yes, sir.

Motion that be stricken out as incompetent, immaterial and irrele-  
vant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What if any other collateral security for the payment of these notes did the Bank of Commerce hold at the time these notes were signed?

Same objection. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. One five thousand dollar life insurance policy and one ten thousand life insurance policy.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did it hold any other collateral security for the payment of these notes, if so what was it?

Same objection; incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Mining stock, twenty-five thousand dollars in Rosedale mine.

Move to strike out as incompetent, *immaterial* and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Was that the New Golden Bell Mining Company?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

118 A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Does the Bank of Commerce still hold those insurance policies and that mining stock as collateral?

Objected to. Incompetent, irrelevant and immaterial and not in conformity with the pleadings. Entirely immaterial as to whether they held it or not.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

## Cross-examination.

By Mr. DOUGHERTY:

Q. Mr. Broyles you say that Mr. Johnson was there at San Marcial several times?

A. Yes, sir.

Q. How many times was he there prior to April 9, 1908?

A. Two or three times, I do not remember.

Q. About when was the first time that he was there?

A. Last part of 1897. Last part of 1907.

Q. When was the next time he was there?

A. I think it was in February.

Q. When was the next time?

A. In April.

Q. Then as a matter of fact you remember that he was there three times?

A. I think so, yes, sir.

Q. When you say you think so are you testifying to what you know or what you think?

119 A. He was there several times. I do not remember the dates.

Q. How long was he there the time that you speak of in February?

A. One or two days, I do not remember, sir.

Q. Is that not the time, Mr. Broyles, that he made the examination of the books that you speak of?

A. Yes, sir.

Q. And that was the time that he made this examination about which you have testified about?

A. Yes, sir.

Q. And when he came down in April that was the time of the signatures of the notes?

A. Yes, sir.

Mrs. ZUZENA BROYLES, a witness called on the part of the defense, being first duly sworn according to law, upon her oath testified as follows, to-wit:

## Direct examination.

By Mr. FALL:

Q. What is our name

A. Zuzena Broyles.

Q. Where do you live?

A. At San Marcial.

Q. What relation if any do you bear to J. N. Broyles, one of the defendants in this case?

A. His wife.

Q. Mrs. Broyles do you know Mr. Johnson, W. J. Johnson?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Where did you first know Mr. Johnson?

Objected to as incompetent, irrelevant and immaterial and  
120 not in conformity with the pleadings.

Overruled.

Exception.

A. I met Mr. Johnson in San Marcial in December when he came down to make an investigation of my husband's business.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. When did you next meet him?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I think it must have been in February. I would not say for sure but I am almost sure it was in February.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Where was that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I met him in the store and then at that time I sent for him to come to the house.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. That was the store and your house in San Marcial?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

121 Move to strike out as incompetent, irrelevant and immaterial, immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What was Mr. Johnson doing there at that time?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I suppose he was seeing after the——

Q. State what you know from conversations with Mr. Johnson?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. And that any conversation had with Mr. Johnson is not binding upon the plaintiff.

Overruled.

Exception.

A. He was looking after the debt that my husband owed him.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Do you mean Mr. Johnson?

Objected to as incompetent, irrelevant and immaterial; is not in conformity with the pleadings. And that any conversation had with Mr. Johnson is not binding upon the plaintiff.

Overruled.

Exception.

A. Mr. Broyles owed the Bank of Commerce.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. You say that you sent for him to come to your house?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

122 Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you have any conversation with him at that time at your house?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. And that any conversation had with Mr. Johnson is not binding upon this plaintiff.

OVERRULED.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Was that conversation concerning the financial affairs of your husband and the connection of the Bank therewith?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. And any conversation had with Mr. Johnson is not binding upon the plaintiff.

Objection overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. State that conversation.

Objected to upon the grounds that it is not a proper issue under the pleadings in this case; and further upon the ground that any statement made by Mr. Johnson is not in any way binding upon the plaintiff in this case; and further that any conversation had 123 by Mrs. Broyles with Mr. Johnson, she not being one of the defendants is under no theory of the case such a statement as will bind the plaintiff, therefore irrelevant, incompetent and immaterial.

By the COURT: The proposition is this. It has been shown and testified to by the witness preceding this one that Mr. Johnson made certain representations to some of these signers. Now if he had been a witness on the stand and had testified to a fact inconsistent with a declaration made at some other time it would be competent to show that declaration. Now this is offered on the theory, I assume, that a statement was made to this witness different from the statement made to the defendant.

By Mr. FALL: And the allegations in this case are that he made fraudulent representations. The only way that we can trace those fraudulent representations is to prove that he made distinct representations and to show his actual knowledge of the affairs. We offer this evidence for this purpose. We propose to show that this witness that Mr. Johnson who has already been a witness did not get his information and did not make his statements truthfully and that he had other knowledge in his possession at that time and that he imparted that knowledge and that he made statements to other

parties showing that he knew Mr. Broyles was a bankrupt at this time prior to the procuring by him of these signatures.

By the COURT: Now this representation testified to by Mr. Broyles, if true, if made in good faith without fraud would furnish no defense for the defendants, but if made in bad faith by the representative of the Bank at the time it would bind the Bank and vitiate the contract would it not? Now they are seeking to show by this witness that that representation which they have testified to was made in bad faith. The only way they can show that is to show that this man knew different when he made the statement. On that theory it is offered.

Overruled.

Exception.

Q. State what that conversation was?

A. I felt this way that I wanted a thorough understanding between—

124 Object — that as to what her feelings were. Mr. Broyles is not a defendant in this case and not represented. Incompetent. Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. And that any conversation had with Johnson is not binding upon this plaintiff; and further that any conversation had by Mrs. Broyles with Mr. Johnson, she not being one of the defendants is under no theory of the case such a statement as will bind the plaintiff.

By the COURT: It is competent for the witness to show that she enquired and to show the reason she had for inquiring as tending to verify and strengthen her statements.

Overruled.

Exception.

A. I felt this way that I wanted a thorough understanding between Mr. Johnson and myself about my husband's business and I sent for him as a friend. I wanted justice done, and I made the remark to him, now you have our best notes all that are payable it seemed like he had, and the National Bank had the mortgage on the best part of our property; I says now how is Mr. Broyles to go on with his business and what will you do if you cannot collect these notes.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What notes did you refer to?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. That he held of Mr. Broyles; suppose he could not collect them. Then he says, well there it is. And he made the remark

how much my husband would be worth if the notes were collected and I just did that way, if he don't collect them, and that was about all there was to that part.

Move to strike out all of this upon the ground—the first 125 part of the witness' testimony relates to what her feelings and object was, she being but the wife of a witness in the case; and move to strike out the balance as not being or tending to prove the facts which the counsel stated in the beginning they desired to prove by the witness, namely that they wanted to prove actual knowledge of a different condition in the mind of one they claim to be the agent of the plaintiff in this case; different from that as stated to the defendant; the evidence not in any manner tending to show the condition as stated by counsel.

And the general motion incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What was the purport of the words if you can remember them of Mr. Johnson with reference to what your husband would be worth if he collected all these outstanding obligations and what he would be worth, or what was Mr. Johnson's judgment of his condition in event these outstanding obligations could not be collected?

Same objection as to the last motion to strike out.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. And that any statement made by Mr. Johnson is not in any way binding upon the plaintiff in this case; and that any conversation had by Mrs. Broyles with Mr. Johnson, she not being one of the defendants, is under no theory of the case such a statement as will bind the plaintiff.

Overruled.

Exception.

A. He made the remark I think that he would be worth eighty thousand dollars if we could collect all of our notes, but he did not make any remark what would happen if we didn't.

Move to strike out as not tending to prove the facts which the counsel stated in the beginning they desired to prove by the witness, namely that they wanted to prove actual knowledge 126 of a different condition in the mind of one they claim to be the agent of the plaintiff in this case; different from that as stated to the defendant; the evidence not in any manner tending to show the condition as stated by counsel.

Incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. That is if all the notes which were due Mr. Broyles could be collected.

Objected to as incompetent, irrelevant and immaterial and not

in conformity with the pleadings. And that any statement made by Mr. Johnson is not in any way binding upon the plaintiff in this case; and that any conversation had by Mrs. Broyles with Mr. Johnson, she not being one of the defendants, is under no theory of the case such a statement as will bind the plaintiff.

Overruled.

Exception.

A. Yes, sir.

Renew our motion to strike out upon the ground of the last motion, it not tending to prove a different knowledge or frame of mind or fact tending to corroborate it. Incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. You say you stated to Mr. Johnson that you have all the best of our notes, was that it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. And that any conversation had with Mr. Johnson is not binding upon this plaintiff; and that any co-versation had by Mrs. Broyles with Mr. Johnson, she not being one of the defendants is under no theory of the case such a statement as will bind the plaintiff.

Overruled.

Exception.

127 A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What notes did you have reference to, were they collateral notes which Mr. Johnson had turned over to the Bank which Mr. Broyles had turned over to Mr. Johnson's bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. And that and conversation had with Johnson is not binding upon the plaintiff in this case; and that any conversation had by Mrs. Broyles with Mr. Johnson, she not being one of the defendants, is under no theory of the case such a statement as will bind the plaintiff.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. And as I understand, what you wanted to know from Mr.

Johnson, the representative of the Bank was what Mr. Broyles' condition financially would be in view of the fact that the Bank had these notes and that if the notes were collected what his standing would be financially and if the notes were not collected what his financial condition would be, that was your object?

Same objection and additional objection that it is argumentative and leading.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. And that any conversation had with Mr. Johnson is not binding upon this plaintiff; and that any conversation had by Mrs. Broyles with Mr. Johnson, she not being one of the defendants is under no theory of the case such a statement as will bind the plaintiff.

128 Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. And Mr. Johnson replied as I understand, saying that if the notes which they held as collateral could all be collected Mr. Broyles would be worth quite an amount of money, about eighty thousand dollars—but if not, there you are?

Same objection. Argumentative and leading.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; and that any conversation had with Mr. Johnson is not binding upon this plaintiff; and that any conversation had by Mrs. Broyles with Mr. Johnson, she not being one of the defendants, is under no theory of the case such a statement as will bind the plaintiff.

Overruled.

Exception.

A. Yes, sir; that is the remark he made.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. Did you at any time thereafter have a conversation or communication with Mr. Johnson or any one else representing the Bank of Commerce with reference to your husband's indebtedness and his financial condition?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; and that any statements made by Johnson not binding upon this plaintiff.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. With whom?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. With Mr. Johnson.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Where?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I wrote him in Albuquerque, me in San Marcial.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. About when was that more or less?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I wrote him before this conversation that I was not pleased with the way—I could not say the date; I wrote him before that is all.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you write him or have any conversation with him after this date about February or March when you talked with him?

130 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. Any statements made by Johnson not binding upon this plaintiff.

Overruled.

Exception.

A. None with Mr. Johnson. I wrote Mr. Strickler.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Do you remember Mrs. Broyles about the time when those notes that are now sued on were being signed up, that is the occasion?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I remember the week; I do not know the date nor anything like that. I remember the week.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you about that time as the wife of Mr. Broyles make any communication to the Bank with reference to Mr. Broyle's financial condition.

Objected to.

If you desire I will lead up to it if that is the ground, I haven't laid the foundation.

Objected to on the general ground that any communication had between this witness and the Bank does not in any way throw any light upon the subject of these defendants and plaintiff and further upon the general objection which I have made to all this testimony in this case, does not conform to the pleadings; incompetent, irrelevant and immaterial.

By the COURT: I cannot rule at present.

Overruled. I do not know what it is.

131      Exception.

A. I wrote Mr. Strickler.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What was the purport of that communication and why did you make it?

Objected to on the same general ground, incompetent, irrelevant and immaterial and not in conformity with the pleadings. And further upon the ground that that is not the proper way to prove contents of a written communication.

Q. You have no copy of that letter have you Mrs. Broyles?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. No, sir; I never thought of saving the copy.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. You haven't the letter in your possession?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Objection overruled.

Exception.

A. Mr. Strickler may have it I do not know. I remember the contents very distinctly.

By Mr. FALL: Call upon Mr. Johnson as representative of the Bank and the attorney here to produce that letter.

By Mr. JOHNSON: Haven't got it with me. They have given us no notice.

Q. I will separate that question. Why did you write that letter to Mr. Strickler?

As to the intent of the person writing the letter we object and on the addition- ground as stated to the last question that that 132 is not the proper way to prove contents of a written communication. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Q. State what facts caused you to do that?

By the COURT: This is of doubtful admissibility.

Exception.

By Mr. FALL: We propose to prove by this witness that she called the attention of the Bank to the fact that they were obtaining securities from poor cow men here, defendants in this case when they knew that Mr. Broyles was broke, when the Bank knew that Mr. Broyles was broke.

By Mr. DOUGHERTY: The letter itself speaks for itself.

By the COURT: The plaintiff will have to have the opportunity to produce the letter.

Court in recess until two o'clock.

HENRY EVANS, a witness called on behalf of the defendants, being first duly sworn according to law, upon his oath testified as follows, to-wit:

Direct examination.

By Mr. HOLT:

—. State your name.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Henry Evans.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Where do you live Mr. Evans?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I live southwest of San Marcial in the foot of the San Mateo mountains.

Move to strike out as incompetent, immaterial irrelevant; 133 immaterial under the allegations of the defendant's answer.

Q. What is your business?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Well I am stock raising.

Move to strike out as incompetent, immaterial and irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What kind of stock?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Cattle and horses.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. How long have you been engaged in that business?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Thirty years.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. How long have you lived in Socorro County?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Something over nine years.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Have you been engaged in that business all the time you have lived in Socorro County?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Are you one of the defendants in this suit?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Do you know Mr. W. J. Johnson the gentleman sitting to the left of Mr. Dougherty, assistant cashier of the Bank of Commerce of Albuquerque?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir; I have met him.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Where did you first meet him?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

135 Objection overruled.

Exception.

A. San Marcial.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. When?

Objection to as incompetent, irrelevant and immaterial; not in conformity with the pleadings.

Overruled.

Exception.

A. In April.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Of this year?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Q. In what part of San Marcial did you meet him?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. At J. N. Broyles' bank.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Are you one of the parties who signed the notes sued on in this case?

136 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Just before signing those notes Mr. Evans did you have any conversation with Mr. W. J. Johnson in Broyles' Bank with reference to Broyles' financial condition?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings and that any conversation had with Johnson is not binding upon this plaintiff.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Who was present at the time of that conversation?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Were not any one in there but him and Mr. Broyles.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Mr. Broyles present at the time you talked to him?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Well I do not remember whether he was present all the 137 time or not, but he was in there some of the time.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. About how long did that conversation with Mr. Johnson last?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Just a short time. I would not testify just how long; not very long.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Can you remember the substance of that conversation upon that subject?

Retain same general objection that it is incompetent, irrelevant and immaterial; any statement made by Mr. Johnson does not bind the Bank and that it does not conform to the pleadings.

Overruled.

Exception.

A. Well, yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Overruled.

Exception.

Q. Now Mr. Evans tell as near as you can remember the conversation which passed between you and Mr. Johnson at that time and place upon the subject of Mr. Broyles' financial responsibility.

Same objection; incompetent, irrelevant and immaterial and not in conformity with the pleadings. And that any statements made by Mr. Johnson are not binding upon this plaintiff.

138 Overruled.

Exception.

A. Well Mr. Broyles came to me first and I had been on some notes.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Overruled.

Exception.

Q. Who sent for you or came to you and ask- you to sign these notes sued on in this case?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Mr. J. N. Broyles.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. As a result of Mr. Broyles' request in this conversation with you did you or not go to his bank for the purpose of meeting Mr. Johnson?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Who if any one introduced you to Mr. Johnson on that occasion?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Mr. Broyles.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Denied.

139      Exception.

Q. Now state the conversation which occurred between you and Broyles and Johnson on that occasion as near as you can remember there in the bank.

One additional objection, I don't think it is quite clear, to all this class of testimony is that it having been shown that Mr. Evans was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Incompetent, irrelevant and immaterial and not in conformity with the pleadings; and any statements made by Johnson are not binding upon this plaintiff.

Overruled.

Exception.

Q. Proceed and relate the conversation to which I have directed your attention.

Same objection.

A. Well, as I went to state, he held—held some papers against me, the bank that he represented.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Whose he?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. The bank that he represented; and I told Mr. Johnson that I didn't care you know to be involved in any more papers.

Move to strike out as incompetent, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Do you mean by the statement that the bank he'd 140 some paper against you that they held some of your individual paper.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

A. I told them that I was worth more than what I owed myself but I could not do anything for outside through accommodation. He told me then that Mr. Broyles was perfectly good and he had talked with others.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. In that conversation do you remember whether or not Mr. Johnson said anything to you regarding security or collateral which

the Bank of Commerce held belonging to Mr. Broyles to secure the payment of these notes which you were asked to sign?

Same objection. It having been shown that Mr. Evans was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Incompetent, irrelevant and immaterial and not in conformity with the pleadings. And any statements made by Johnson are not binding upon this plaintiff.

Overruled.

Exception.

A. He said he was good you know and safe and more than that he told me, he says we would not think of pressing any one at this time.

Move to strike that out; he said he would not do that—would not think of such a thing as pressing people at this time. Incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion sustained.

Exception.

141 By the COURT: You will not consider gentlemen what the witness said about the statement of Mr. Johnson that they would not think of enforcing collection on this note as times were at that time.

Q. Mr. Evans can you remember the substance of what Mr. Johnson said to you with reference to the collateral security which the Bank of Commerce held?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; and further objection to all this class of testimony is that it having been shown that Mr. Evans was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him and statements made by Johnson not binding on the plaintiff.

Overruled.

Exception.

A. I do not remember the amount.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Q. Do you remember that he did say that these notes were amply secured by collateral?

Objected to as incompetent, irrelevant, immaterial and irrelevant and not in conformity with the pleadings. And that any statement made by Johnson is not binding upon this plaintiff; and it having been shown that Mr. Evans was one of the original makers upon the

original note upon which the notes sued upon were given—was an original makers and therefore it is incompetent as to any statements made at that time to him.

Objected to as leading.

Objection sustained.

Exception.

Q. What is your recollection of what Mr. Johnson said upon that subject about the collateral, whether or not these notes were secured by little collateral or by ample collateral or what was it?

142      Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. And any statements made by Johnson not binding upon this plaintiff; and it having been shown that Mr. Evans was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Overruled.

Exception.

A. Ample collateral.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Now Mr. Evans at the time you signed these notes do you remember whether or not the time when they were payable was filled in?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; and any statements made by Mr. Johnson not binding upon this plaintiff.

Overruled.

Exception.

A. I understood six months.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. From whom did you understand that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; and any statements made by Mr. Johnson not binding upon this plaintiff; and it having been shown that Mr. Evans was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

143      Overruled.

Exception.

A. Mr. Johnson.

Move to strike out as incompetent, irrelevant and immaterial; and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Cross-examination.

By Mr. DOUGHERTY:

Q. Mr. Evans how long have you been doing business with Mr. Broyles or had you been doing business prior to April 9, 1908?

A. You asked me how long Mr. Dougherty?

Q. That is the question?

A. Nine years.

Q. Your relations with Mr. Broyles had been very close hadn't it Mr. Evans?

A. No more than any other merchant that I have dealt with.

Q. You had some financial relations with him for a number of years hadn't you?

A. Well, yes, sir, some at times, yes, sir.

Q. You were under some obligation to him were you not in a financial way?

A. I didn't feel so.

Q. Then if I understand, you didn't feel under any financial obligation to Mr. Broyles at all?

A. Any more than he was a good accommodating man.

Q. He had accommodated you by endorsing your paper quite a number of times hadn't he?

A. He had endorsed some papers for me.

Q. He also was holding notes of yours wasn't he?

A. None of my own notes, no.

Q. Do you mean to say that you hadn't given up to that time any notes to Mr. Broyles?

A. He had endorsed some notes to this bank for me.

Q. Then he had been endorsing your paper before this April 9th, had he?

144 A. Well those papers that I spoke of those people—that those people held against me.

Q. Those were your notes themselves?

A. Yes, sir.

Q. You had gotten the money from Mr. Broyles for those notes hadn't you and he accommodated you by endorsing the notes and sending them up to the other bank?

A. Yes, sir; I got the money through Mr. Broyles.

Q. Then when you make the statement that your relation with Mr. Broyles was the same as any other merchant, do you mean to be understood that it was the custom of other merchants to endorse your paper that way?

A. I have had them to do it.

Q. Well it wasn't the general—other merchants generally didn't do it did they?

A. I generally did not have them endorse, no I did not because I had some money.

Q. Then Mr. Broyles had been accommodating you considerably more than any one else in the way of endorsing paper hadn't he?

A. Well right at the present time he had then, yes sir.

Q. I mean at that time?

A. Yes, sir.

Q. Then in a certain sense you were under some obligations to Mr. Broyles don't you think Mr. Evans?

A. Not any more than I would be to any other friend. If I was dealing with another man, a friend, I would feel under the same obligations to them as I do to him.

Q. Any other man that was in the habit of endorsing your paper?

A. I haven't had very much paper endorsed.

Q. I say any other man?

A. Yes, sir; if any other man would come along.

Q. How did you come to come into San Marcial on April 9th?

A. I could not tell you. Maybe I had some business there. I come down very often, I do not remember.

Q. How long had you been acquainted with Mr. Johnson prior to April 9th, the day you signed these papers?

A. I didn't know there was such a man.

Q. Now then Mr. Broyles is a man with whom you had been dealing for some years and a man who had been in the 145 habit of endorsing your paper and Mr. Johnson was an entire stranger to you?

A. Yes, sir; he was a stranger to me.

Q. Now then, where was it you met Mr. Johnson that day before you signed the paper first.

A. Oh somewhere there about his business; he had some business buildings, I do not remember what part, might have been in the store or—

Q. Now Mr. Evans we are trying to prompt your recollections. You have sworn in regard to certain statements and facts and acts that took place at the time that you signed these notes. Now I want you to refresh your recollection and to the best of your present recollection, where was it that Mr. Broyles first saw you in regard to signing these notes?

A. Well I had walked down the street. I had left there and went off to what is known as Armstrong Brother and Can Jean's store south of his business.

Q. Well go ahead?

A. Well he came down there then.

Q. Who came down?

A. Mr. Broyles.

Q. What did Mr. Broyles say to you when he came down there?

A. He spoke to me and told me Mr. Johnson was or had came or something to that amount.

Q. What did he say about signing notes?

A. He asked me to go up to the Bank.

Q. For what purpose?

A. I suppose to sign those notes.

Q. I am not asking what you suppose, I am asking you what was said?

A. He just spoke as I told you. He said Mr. Johnson has came now and he had talked to me before about those notes as I told you first.

Q. When did he first talk to you about signing these notes, Mr. Broyles?

A. Same day I made up my mind I would not sign any more notes until after I met this gentleman only my own paper until I had a talk with him.

Q. Where was that?

A. That was at the bank.

146 Q. Then he told you Mr. Johnson came in that morning did he?

A. I don't know what time he said. I don't know that he told me what time he came to town. I didn't know him. If I had seen him in town I would not have known him. He didn't tell me what time he came in.

Q. What time was it, how long before that this last conversation was it he told you he wanted you to sign these notes?

A. Before I signed them?

Q. I am talking about the first time he spoke to you about signing these new notes?

A. It was some time in the afternoon that day.

Q. Well now Mr. Evans about how long before it was that you signed the notes did he first speak to you about signing them?

A. Before I understand you to say, how long before that he made the first talk to me.

Q. Yes, sir; how long?

A. Well I say it was sometime in the afternoon and late that evening I signed those notes, that day you know, the same day.

Q. You had signed the notes before in November hadn't you?

A. Yes, sir.

Q. And these were new notes for those notes you had signed in November were they?

A. That is the reason why that I refused.

Q. Were they the new notes for those notes you signed in November?

A. Well I understand the way he recommended to me—

Q. I am not taking about what was said; if you do not know why say so?

A. I understood it was for collateral just to keep this amount going on for his business.

Q. Were they the new notes for those notes you had signed in November? I will put the question again. Were the notes that you signed about April 8th or 9th new notes for which you and others had signed in November?

A. I hadn't signed the old notes any more but I suppose it was to take those notes up under the circumstances.

147 Q. And you say that Mr. Broyles first told you that he wanted you to sign these new notes to take up your old note?

A. No, he didn't tell me that, Mr. Broyles didn't.

Q. What did he tell you? Now you say that Mr. Broyles said that Mr. Johnson has come?

A. Yes, sir.

Q. Did you know who Mr. Johnson was?

A. No, sir.

Q. Didn't know anything about Mr. Johnson?

A. No, sir.

Q. He was an entire stranger to you?

A. Yes, sir.

Q. You didn't know his business or anything about him?

A. I did before I signed those notes.

Q. I am talking about the time you went up there?

A. That is the first time I had met him that I know.

Q. Now when you went up there what was said; what did Mr. Broyles say; what was the first thing that was said when you met Mr. Johnson?

A. He gave me an introduction to Mr. Johnson.

Q. What did he say about Mr. Johnson?

A. I do not remember what he said about Mr. Johnson, but any way he give me to understand that he was an agent or a cashier of that bank. I never had been at their bank you know.

Q. What bank?

A. The bank that he represents.

Q. What bank is that?

A. Well, I don't know what they call it.

Q. You don't even know now what bank it was do you Mr. Evans?

A. I believe they call it the Bank of Commerce.

Q. Are you sure it was called the Bank of Commerce?

A. I am pretty sure, Yes, sir.

Q. Was there anything said about the Bank of Commerce at that time?

A. Nothing any more than what I said, spoke of Mr. Johnson telling me.

Q. What did Mr. Johnson say, what did you say he said about Mr. Broyles?

148 A. He said Mr. Broyles was good and he would not think of bothering any one at that time.

Q. What did he say about Mr. Broyles being good?

A. Yes, sir, he said he was perfectly good.

Q. And you took the word of Mr. Johnson did you?

A. Yes, sir.

Q. An entire stranger to you?

A. He told me he talked to Frank Johnson a neighbor of mine and Mr. Johnson told him also that he was all right.

Q. Now I am asking you if you took the word of an entire stranger and relied upon that, a man whom you had never met or never heard of that Mr. Broyles introduced you to.

A. I take it as he told me.

Q. And you relied upon this entire stranger's word?

A. I did. I relied on what he told me there on those papers.  
I—

Q. And you didn't rely upon Mr. Broyles, a man who had endorsed your paper and with whom you had been doing business with for years?

A. I did as I told you before.

Q. You did what?

A. As I would do any other friend or accommodating man that would accommodate me.

Q. Then Mr. Broyles had accommodated you and you wanted to accommodate Mr. Broyles, is that it?

A. That is the way it was, Yes, sir.

Q. And as he had accommodated you you wanted to accommodate him if I understand you?

A. As I told him you know I was able for my own.

Q. Just answer my question. As you had—Mr. Broyles had accommodated you you wanted to accommodate Mr. Broyles and you signed the paper, is that or is that not true?

By Mr. FALL: I insist he is asking for his reasons and has a perfect right to explain them. He is not compelled to say, yes, sir, or not.

By the COURT: He must answer the question first and then make explanation.

Q. Question repeated. As Mr. Broyles had accommodated you you wanted to accommodate Mr. Broyles and you signed  
149 the paper, is that or is that not true?

A. Yes, sir; that is true as I said.

Redirect examination.

By Mr. HOLT:

Q. Prior to the time you signed this paper, before you signed this paper and before you talked with Mr. Johnson had you or not declined to sign the paper at Mr. Broyles' request.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; any statements made by Mr. Johnson not binding upon this plaintiff. And it having been shown that Mr. Evans was one of the original makers upon the original note upon which the notes sued upon were given was an original maker and therefore it is incompetent as to any statements made at that time to him.

Overruled.

Exception.

A. No, I didn't want to sign it any more.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you or not make up your mind to sign it as a result of your conversation with Mr. Johnson?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; any statements made by Mr. Johnson not binding upon the plaintiff. And it having been shown that Mr. Evans was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Overruled.

Exception.

A. I did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

W. E. PRATT a witness called on behalf of the defendants being first duly sworn upon his oath testified as follows, to-wit:

Direct examination.

By Mr. HOLT:

Q. What is your name?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. W. E. Pratt.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Where do you live Mr. Pratt?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. About thirty miles southeast of San Marcial.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Is that in Socorro County where you live?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What is your business?

Objected to as incompetent, irrelevant and immaterial  
151 and not in conformity with the pleadings.

Overruled.

Exception.

A. Stock business.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. What kind of stock do you raise?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Both cattle and horses.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. How long have you been engaged in the stock business?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. About ten years.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Are you one of the defendants in this case?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

152      Exception.

Q. Do you know Mr. W. J. Johnson, assistant cashier of the Bank of Commerce of Albuquerque?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

— How long have you known him?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Objection overruled.

Exception.

A. I think the first time I ever met Mr. Johnson was in November of 1907.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Where did you then meet Mr. Johnson?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. San Marcial.

Move to strike out as incompetent, immaterial and irrelevant; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you ever meet him afterwards?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

153 Move to strike out as incompetent, irrelevant *incompetent*, and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Where?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I met him in San Marcial.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. When?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. The 10th day of April this year.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you know Mr. Broyles at that time?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Are you the person who signed the two notes sued on in this case under the name of G. P. Anderson?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

154 Overruled.

Exception.

A. I am.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. How did you come to sign those notes Mr. Pratt?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Well you want the history of it do you?

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did any one send for you and ask you to sign the notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Who was it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Mr. Broyles.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Where were you when he sent for you?

155 Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I was at the ranch.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did he send for you more than once?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. He asked me to sign those notes about the first of the month or along the fore part of the month. I went to the ranch without signing them and on April 9th I received a letter from Mr. Broyles asking me to come in on important business; also Mr. Broyles sent word by Mr. Brown for me to come in and sign these notes.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Well did you go in?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. When I received the letter to come in on important business I went in.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. After you arrived at San Marcial did you have a talk with Mr. Broyles about this matter?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

156 Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Was any request made of you at that time by him that you sign these notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir; there was.

Objected to as incompetent, irrelevant, immaterial; and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. At that time—at the time that request was made did you agree to sign them?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. No, I didn't.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did he after you came into San Marcial ask you more than once to sign the notes?

Same objection. Incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. He asked me to come in and talk over the situation with Mr. Johnson in Mr. Broyles' Bank.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

157 Motion denied.

Exception.

Q. Just before he asked you to do that had you or had you not declined to sign the notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I told Mr. Broyles I didn't care to sign them.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Overruled.

Exception.

Q. Then he asked you to come into his bank and talk the matter over with this Mr. Johnson who is here?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you comply with his request?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I did.

Move to strike out as incompetent, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you have any talk with Mr. Johnson?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

158      Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. In that talk did Mr. Johnson say anything to you upon the subject of Mr. Broyles' financial responsibility?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; and that any statements made by Johnson are not binding upon this plaintiff; and it having been shown that Mr. Pratt was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Overruled.

Exception.

A. Yes, sir; he did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Please state to the jury what he said as near as you can remember, and the whole conversation as between you and him—that subject?

Same objection. Incompetent, irrelevant and immaterial and not in conformity with the pleadings; and that any statements made by Johnson are not binding upon this plaintiff; and it having been shown that Mr. Pratt was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Overruled.

Exception.

A. Well we talked over the business affairs of Mr. Broyles and Mr. Johnson told me that he had made a personal investigation and found that Mr. Broyles was perfectly safe.

159 Same objection. Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Perfectly safe how, if he said?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; and that any statements made by Johnson are not binding upon this plaintiff; and it having been shown that Mr. Pratt was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Overruled.

Exception.

A. Financially.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did he say anything to you about to what extent he was financially safe; go on and state all he said about this?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; and that any statements made by Mr. Johnson are not binding upon the plaintiff; and it having been shown that Mr. Pratt was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Overruled.

Exception.

A. We talked over the proposition about signing these notes. Mr. Johnson told me that he had made an investigation of Mr. Broyles' books and found him in good circumstances; perfectly safe;

160 that Mr. Broyles at this time was a little hard up for ready cash but as soon as stock began to move and Mr. Broyles began to collect any money why that he would be able to take care of his financial difficulty at this time.

Move to strike out all that part about what he expected to do. Incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

By the COURT: That is descriptive of the financial condition of Broyles.

Motion denied.

Exception.

Q. In that conversation did Mr. Johnson make any statement to you regarding what security, if any, the Bank of Commerce held for the payment of these notes which he was asking you to sign?

Same general objection. Incompetent, irrelevant and immaterial and not in conformity with the pleadings; and that any statements made by Mr. Johnson are not binding upon this plaintiff; and it having been shown that Mr. Pratt was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Overruled.

Exception.

A. He didn't state exactly what the collateral was; he said the notes were amply secured.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under -he allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did he say by what or in what manner they were amply secured?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; and that any statements made by Mr. Johnson are not binding upon this plaintiff; and it having been shown that Mr. Pratt was one of the original makers upon 161 the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Overruled.

Exception.

A. I don't think that he did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Do you remember whether or not he used the expression that they were amply secured by collateral?

Objected to as leading.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings; and that any statements made by Johnson are not binding upon this plaintiff; and it having been shown that Mr. Pratt was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Overruled.

Exception.

A. It was my impression that the notes were amply secured either by collateral or mortgage; that was my impression at the time.

Move to strike out; incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Sustained.

By the COURT: You will not consider this last answer, gentlemen.

Q. State as near as you can recollect the words or the substance of his language upon the subject of in what manner these notes were amply secured?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. And any statements made by Mr.

Johnson are not binding upon this plaintiff; and it having 162 been shown that Mr. Pratt was one of the original makers upon the original note upon which the notes sued upon were given—was an original maker and therefore it is incompetent as to any statements made at that time to him.

Overruled.

Exception.

A. Well I would have to commence at the beginning when he asked me to sign the notes.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Talking about Mr. Johnson?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Go ahead and answer the question in your own way.

Same objection.

Exception.

A. He asked me to sign these notes. I picked up the notes and looked at them and seen a number of names on them. I says to Mr. Johnson, I says, looks to me like there was plenty of signatures in these notes already, and Mr. Johnson made the remark, it is, they wanted to get all the signatures they could, that the notes were amply secured and that they wanted the signatures of us people, ranchmen down there to make a good showing before their Board of Directors.

Move to strike out that last. Incompetent, irrelevant and immaterial and immaterial under the allegations of the defendant's answer.

Sustained.

163      Exception.

By the COURT: You will not consider what the witness said as to what Johnson said about why he wanted these names on the notes?

Q. Mr. Pratt what finally induced you to sign these notes?

Same objection. Incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Under the impression that it was merely an accommodation and that the Bank of Commerce would never look to us for the payment of them.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Move to strike out the last part.

Sustained.

Exception.

By the COURT: You will not consider that portion of the witness' answer in which he states his belief that the Bank of Commerce would never look to them for the payment of the notes.

Q. Mr. Pratt did you or not rely upon the representations and statements made to you by Mr. Johnson in that conversation and were you or not induced to sign these notes by virtue of those representations to which you have testified?

Same general objection. Incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Now at the time you had this conversation with Mr. Johnson and picking up these notes and looking them over you say you found a number of signatures on them already?

164      Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Do you remember whose signatures were on them at the time you signed?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Please state to the jury.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. Mr. J. N. Broyles, signature, Story and Schmidt, E. W. Brown, Charles Lewis, Charles Crossman, H. Evans.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Now at the time you placed your signature upon them was the time when they were to be payable filled out?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. It was not.

165 Move to strike out as incompetent, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. What if any statement was made to you in that conversation as to the time when the notes were to be made payable?

Same objection; incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. They was to be made payable in six months. That was my understanding.

Move to strike out as incompetent, irrelevant and immaterial and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Cross-examination.

By Mr. DOUGHERTY:

Q. What did you say your name —?

A. My name is W. E. Pratt.

Q. Why did you execute these notes as G. P. Anderson?

A. For the reason that I do my banking business under that name.

Q. Then you have got one real name and one name you do your banking business under?

A. Been doing my banking business under the name of G. P. Anderson.

Q. When you sign promissory notes you sign G. P. Anderson not your true name do you?

I will put a new question. You say you do your banking business under the name of G. P. Anderson?

A. Yes, sir.

Q. When you come to sign promissory notes you do your business under the name of G. P. Anderson?

A. Unless they are secured by a mortgage or something I have always done it.

Q. Why?

A. Because I have been doing my banking business under that name.

166 Q. I am asking you now Mr. Pratt why you use an assumed name to do your banking business and sign promissory notes under that assumed name?

A. Because I want to.

Q. That is the only reason you have?

A. The only reason that anybody knows of here.

Q. Well let's have the reason, have you any objection to stating it?

Objected to as immaterial.

Overruled.

Exception.

A. Just simply because I started in to do my banking business with Broyles that way and I never have changed it.

Q. Now I am asking you Mr. Anderson or Mr. Pratt why you started in to do your banking business under the name of G. P. Anderson since your true name is William E. Pratt?

A. I will have to answer because I want to.

Q. Then that is the only reason you have?

A. That is the only reason I have got to tell.

Q. Then you won't give us the true reason why you do that?

A. I have no other reason.

Q. You say there is no other reason?

A. I say I have no other reason to offer.

Q. My question is, is there not another reason why you do that?

A. There is not at this time.

Q. Just simply because when you deal with the bank you want to go by the name of G. P. Anderson and when you deal with other people you want to be known as William E. Pratt, and this is the note that you signed G. P. Anderson right here?

A. That is the note.

Q. Did you read these notes over before you signed them?

A. I did, yes, sir.

Q. Were these notes filled out at the time you signed them?

A. Those notes were filled out all with the exception "payable on demand without grace" wasn't written in there.

167 Q. Now you are sure that the words "payable on demand without grace" were not in there?

A. Yes, sir.

Q. All of those words?

A. Yes, sir.

Q. I will ask the jury to look at this showing that the words "without grace" are printed words.

Objected to his arguing his case to the jury now.

By Mr. DOUGHERTY: I am simply displaying the notes.

Q. You would like to take back now would you not Mr. Anderson?

— No, sir.

— And you want to cut out, without grace?

A. No, sir; I don't care to cut it out; that I didn't notice—I noticed that the date wasn't put in there when these notes should be paid.

Q. But now you want to cut out the part that is in print here, without grace, don't you?

A. Well I will say that I didn't see in those notes "payable on demand without grace" and I read the notes over.

Q. Now if you are mistaken about one thing you can be just as easily mistaken about another cannot you?

A. Well it is very probable if the word "on demand" had been in there I would have noticed the "on demand without grace."

Q. But as the "on demand" wasn't in there you didn't think there was any grace about the matter, is that it?

A. Well the facts of the case was I didn't expect to have to pay the notes when I signed them.

Q. Now Mr. Anderson will you look at this note, both of these notes, and see how they are filled out as to whether the "on demand" is in the same ink?

A. It looks to me like it was.

By Mr. HOLT: I think you had better qualify him as an expert.

By Mr. DOUGHERTY: I am asking his opinion.

Shows notes to the jury.

Q. How long had you been dealing with Mr. Broyles?

A. Probably ten years.

Q. How much paper had he endorsed for you at different times?

168 A. Well it is pretty hard for me to tell. I have no idea.

Q. You don't keep very close track of the amount of paper you put out do you Mr. Anderson?

A. I know how much I have got out, yes, sir. I know how much paper I have got out.

Q. Well how much of this did Mr. Broyles endorse for you prior to April 8, 1908?

A. I could not say positively.

Q. Well approximately.

A. Probably a good many thousands of dollars.

Q. Approximately twenty or twenty-five thousand dollars hadn't he?

A. At different times in the last ten years I expect he has probably.

Q. Mr. Broyles has been in the habit of endorsing your paper hadn't he for years?

A. He had been in the habit of endorsing it when I was paying him for it twelve per cent interest.

Q. He had been endorsing paper to other people for you hadn't he where he didn't get the interest?

A. To one other party is all.

Q. And that was about thirteen thousand dollars wasn't it?

A. Yes, sir.

Q. You were indebted to Broyles at the time you signed this note considerable amount yourself wasn't you?

A. No, sir.

Q. You mean to say you were not indebted to him?

A. I owed him some grocery account was all. I had money on deposit in his bank.

Q. Well outside of this thirteen thousand dollar account had he endorsed any other paper for you at that time?

A. I had a thousand dollar note with Mr. Broyles; he endorsed

it to the First National Bank of Albuquerque. That note fell due on the fourth of November and I paid Mr. Broyles in full on that note. After the failure of Mr. Broyles' bank I had to pay part of that note over again.

Q. Your relation to Mr. Broyles has been very close hadn't it for years?

169 A. My relation with Mr. Broyles has been very close when I paid him twelve per cent on all moneys that I ever borrowed from him. I paid him for his accommodation.

Q. How about this thirteen thousand dollars, did you pay him for that?

A. Mr. Broyles was secured.

Q. Did Mr. Broyles get anything out of you for endorsing that note to Byerts for thirteen thousand dollars?

A. He was secured when I obtained his signature.

Q. He didn't get any twelve per cent interest out of that did he?

A. Nor I didn't get the money from Mr. Broyles either.

Q. But Mr. Broyles loaned you his signature on that paper the same as you loaned Mr. Broyles your signature here didn't he?

A. He loaned me his signature when I secured him.

Q. But he did endorse the paper and he didn't get twelve per cent interest?

A. He endorsed the paper but I secured him.

Q. You secured Byerts?

A. Yes, sir; I secured Byerts too.

Q. Now Mr. Pratt you say these two signatures were here on the paper when you signed it?

A. Yes, sir.

Q. How did you come to sign above the two signatures here of Charles Lewis and H. Evans?

A. Because there wasn't room to sign below.

Q. There wasn't room here?

A. That is what they asked to sign that paper above. Mr. Johnson asked me to sign it up there.

Q. You had been on the old paper?

A. Yes, sir.

Q. And these notes were the renewal of your old notes were they not?

A. These were renewal of the first paper I had signed I suppose.

Q. That was for twenty-five thousand dollars and this is fifteen thousand of that amount is it not?

A. That is what I understand.

Q. When was the first time that you have alleged any fraud or told anybody about any fraud about getting your signature on these notes?

170 A. That is so when I found out the condition of the Bank and Broyles' business was in.

Q. About the time that you thought you would have to pay something on the note was it?

A. No, sir; it was before, before he ever started suit.

Q. You wasn't in San Marcial at the time Mr. Strickler was down there was you?

A. I was, Yes, sir.

Q. Were you present the night that Mr. Strickler and Mr. Newman had a conversation in Mr. Broyles' store about this paper?

A. I wasn't.

Q. You wasn't there that night?

A. I was in town but I wasn't present.

Redirect examination.

By Mr. HOLT:

Q. Mr. Pratt you say that the words "on demand" appearing in these notes looked to you as though they were written with the same ink as the other blanks?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. They didn't ask me that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Which are filled in there. You don't know do you whether or not those words "on demand" were written in these notes after Mr. Johnson took them back to the Bank at Albuquerque?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. I don't know when it was written in there. It was written there after I signed it.

171 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

CHARLES LEWIS, a witness called on behalf of the defendant, being first duly sworn according to law upon his oath testified as follows:

Direct examination.

By Mr. HOLT:

Q. What is your name?

Objected to as incompetent, irrelevant and not in conformity to the pleadings.

Overruled.

Exception.

A. Charles Lewis.

Q. Where do you live Mr. Lewis?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

A. About thirty-five miles east of San Marcial, in Socorro County.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. How long have you lived there?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Very near four years.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. What is your business?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

172

Overruled.

Exception.

A. Stock raising.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. How long have you been engaged in that business?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Seven or eight years.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. You are one of the defendants in this case are you?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I am.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you sign these two notes which have been introduced here in evidence?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

173 Q. Do you know Mr. W. A. Johnson, assistant cashier of the bank of Commerce of Albuquerque?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I have seen him.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Were you ever introduced to him?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir; I have been introduced to him twice.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion deni-d.

Exception.

Q. Where did you first meet him?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. San Marcial.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Do you remember when?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir; on the ninth day of April.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.  
174

Motion denied.

Q. This year.

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. By whom were you introduced to him?

Objected to as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Overruled.

Exception.

A. By J. N. Broyles.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Where did you meet him.

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

**A. In the Bank at San Marcial.**

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Overruled.

Exception.

**Q. Broyles' Bank?**

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled.

Exception.

175      A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Did you have any conversation with Mr. Broyles about signing these notes before he introduced you to Mr. Johnson?

Same objection. Incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

**A. I did.**

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. How did you happen to come into San Marcial on that occasion?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I come into San Marcial on the eighth day of April after a load of corn.

Move to strike out as incompetent, irrelevant and immaterial and not material under the allegations of the defendant's answer.

Denied.

Exception.

Q. Did anybody ask you on that day or the following day to sign these notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Mr. Broyles asked me to sign these notes on the morning of the night.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

176      Denied.

Exception.

Q. Did you agree to sign them or decline to sign them at his request?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I told him that I didn't care to sign any notes.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. What further conversation passed between you and him about signing them before he introduced you to Johnson?

Same objection. Incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Mr. Broyles told me that he had a note for twenty-five thousand dollars in the Bank of Commerce and it was an accommodation note and he wanted a few of us cattle men to sign it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you—is that the time when you declined to sign it?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Well after you refused to sign it or said that you didn't care to sign it, what if anything did he say to you about Mr. Johnson being there on the ground?

177      Objected to as incompetent, irrelevant and immaterial and no- in conformity to the pleadings.

Overruled.

Exception.

A. He taken me in the bank and introduced me to Mr. Johnson.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Q. Did you have any talk with Mr. Johnson about signing the notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. In that conversation did Mr. Johnson make any statement or statements to you regarding Mr. Broyles' financial responsibility and condition at that time?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. He did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. What statement did he make to you upon that subject now?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings; and any statements made by Johnson not binding upon this plaintiff.

Overruled.

Exception.

178 A. He said after examining Mr. Broyles' business he found Mr. Broyles to be in good shape and that these notes were all secured by collateral.

Objected to as incompetent, irrelevant and immaterial and immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. As a result of that conversation with Mr. Johnson what did you do?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings. And any statements made by Johnson not binding upon this plaintiff.

Overruled.

Exception.

A. I signed the notes.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you rely upon Mr. Johnson's representations and were you by virtue of those representations induced to sign these notes or not?

Same objection. Incompetent, irrelevant and immaterial and not in conformity to the pleadings; and that any statements made by Johnson are not binding upon this plaintiff.

Overruled.

Exception.

A. I would not have signed the notes if it hadn't been for the conversation I had with Mr. Johnson.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

#### 179 Cross-examination.

By Mr. DOUGHERTY:

Q. Mr. Johnson was a stranger to you?

A. That was the first time I ever met him, that is, that I know of.

Q. And how long had he talked to you before you signed the notes?

A. Oh probably twenty, twenty-five minutes.

Q. Now on the statement of this stranger that twenty-twenty-five minutes' conversation you signed the notes?

A. Yes, sir.

Q. How long had you been dealing with Mr. Broyles?

A. About three years.

Q. Mr. Broyles had been extending accommodations to you hadn't he?

A. When I paid for them he had.

Q. Hadn't he been endorsing your paper?

A. He endorsed one note for me.

Q. You consider that accommodation don't you Mr. Lewis?

A. Well, yes, sir, in a way it is.

Q. You had been dealing with him for some years?

A. Yes, sir.

Q. When was the first time that you ever raised any question about any fraudulent representations Mr. Lewis?

A. The day that you sent for me to come into San Marcial.

Q. Was you present on the night of the sixteenth I think it was of April when a conversation took place between Mr. Newman, your father-in-law, and Mr. Strickler?

A. No, sir, I wasn't.

Q. Wasn't you present in the store that night?

A. No, sir.

Q. Was you cognizant of the fact—was you aware of the fact that Mr. Newman was talking of taking up this note or rather one of the notes for ten thousand dollars—

Objected to as incompetent.

and did you at that time represent that the notes were obtained fraudulently?

A. I wasn't there that time at all.

Question repeated.

180 Q. Was you cognizant of the fact—was you aware of the fact Mr. Newman was talking of taking up this note or rather one of the notes for ten thousand dollars?

No objection.

I am not speaking Mr. Lewis of the night—I want to know if you knew of the fact that Mr. Newman was talking of taking up one of the notes and whether or not you objected on the ground of them being fraudulent?

A. I knew that Mr. Newman was talking of taking up one of the notes, yes, sir.

Q. Now the balance, did you state that these notes were obtained fraudulently?

A. I did to Mr. Newman.

Q. Did you to Mr. Strickler or any one else that was there?

A. I didn't see Mr. Strickler.

Q. Did you with any one connected with the Bank state that these notes were obtained by fraudulent representations?

A. I have never talked to anybody interested with the bank in regard to the notes except Mr. Johnson at the time I signed them.

Q. In what way did you sign these notes, who had signed the note when you signed it?

A. I never looked at the names on the notes when I signed them. He just handed me the notes and I signed them, never looked at the notes at all.

Q. You don't know what names were on the notes at the time you signed them?

A. No, I don't.

Q. Then if I understand you, upon the statement of a stranger you signed a note or notes amounting to twenty-five thousand dollars without looking at the notes or without looking at the names on the notes?

A. I did.

**Redirect examination.****By Mr. HOLT:**

- Q. In this 20-25 minute talk you had with Mr. Johnson there in  
the bank did you and he discuss Mr. Broyles' affairs generally  
181 and his relations to the Bank of Commerce and their relations  
toward him, their attitude toward him?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings. And any statements made by Mr. Johnson are not binding upon this plaintiff.

Overruled.

Exception.

A. We did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you desire to make some explanation of your last answer?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I was going to say it might have been more than twenty, twenty-five minutes, I do not know how long it was. It wasn't very long; it was a short time. I don't care to bind myself to minutes in a conversation.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Now you stated that you had never talked with anybody connected with the Bank of Commerce with reference to these signatures having been obtained fraudulently except Mr. Johnson. You talked on that subject with Mr. Johnson more than once?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I never talked to him about the notes but that one time.

Move to strike out as incompetent, irrelevant and—

182      Exception.

A. I have seen Mr. Johnson a few times.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. You know him do you?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Do you know Mr. W. S. Strickler, cashier of that bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I have met Mr. Strickler several times, yes sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Are you the same man who signed these two notes sued on in this case under the name of Edward W. Brown?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir; I am.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. On what date and where did you sign them if you remember?

183      merce and their relations toward him, their attitude toward him?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings. And any statements made by Mr. Johnson are not binding upon this plaintiff.

Overruled.

Exception.

A. We did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you desire to make some explanation of your last answer?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I was going to say it might have been more than twenty, twenty-five minutes, I do not know how long it was. It wasn't very long; it was a short time. I don't care to bind myself to minutes in a conversation.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Now you stated that you had never talked with anybody connected with the Bank of Commerce with reference to these signatures having been obtained fraudulently except Mr. Johnson. You talked on that subject with Mr. Johnson more than once?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I never talked to him about the notes but that one time.

Move to strike out as incompetent, irrelevant and—

184      Exception.

A. I have seen Mr. Johnson a few times.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. You know him do you?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Do you know Mr. W. S. Strickler, cashier of that bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I have met Mr. Strickler several times, yes sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Are you the same man who signed these two notes sued on in this case under the name of Edward W. Brown?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir; I am.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. On what date and where did you sign them if you remember?

185 Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Those two notes in question there. I signed two of those notes along about the third of April of this year?

Move to strike out as incompetent, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Where did you sign them?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. In San Marcial.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Who was present when you signed them?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Why J. N. Broyles was in the bank.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Was anybody else there then?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED.

Exception.

A. Not that I remember.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

186 Denied.

Exception.

Q. Who if any one asked you to sign them?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED.

Exception.

A. Mr. Broyles.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Were the notes all the blank spaces in the printed part of the notes filled in at the time you signed them?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED.

Exception.

A. The first two notes I signed, one had five thousand dollars on it and the other ten thousand dollars on it and that is all that was filled in.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

DENIED.

Exception.

Q. Were not the notes dated at the time you signed them?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED.

Exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Dened. Exception.

Q. Wasn't the time when they were to be payable filled in?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

187 Overruled.

Exception.

A. No, sir; the notes were not dated.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Dened.

Exception.

Q. I understand, but the time when they were to be paid was that filled in?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I asked Mr. Broyles if they was going to run a life time as there was no date on them.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Dened.

Exception.

Q. Had Mr. Broyles signed them when you signed them?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Dened.

Exception.

Q. Had anybody else signed them at the time you signed them?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I don't know the—there was no name on them, no, there was nobody else ever signed them before me.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

188 Denied and Exception.

Q. Now Mr. Brown after—what did Mr. Broyles say to you when you asked him if these notes were going to run a lifetime?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Objected to. I don't think the conversation between him and Broyles is competent. Incompetent, irrelevant and immaterial; not bound by Mr. Broyles' statement. Hearsay.

Sustained.

Exception.

Q. Mr. Brown between the time when you signed these notes and the ninth day of April, 1908, did you have any conversation with Mr. W. S. Strickler, the vice-president and cashier of the Bank of Commerce of Albuquerque with reference to Mr. Broyles' financial responsibility.

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Object to that for the objection already made before and for the further ground that it is immaterial after the witness had signed the notes as to what representations were made.

Overruled.

Exception.

Q. Question repeated.

Objected to as incompetent irrelevant and immaterial and not in conformity with the pleadings and it is immaterial after the witness had signed the notes what representations were made.

Overruled.

Exception.

A. Yes, sir. I got on the train——

Q. Wait a minute. Where did you have the conversation?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

A. Albuquerque.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

189 Denied.

Exception.

Q. Where is Albuquerque?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

**A. In the Bank of Commerce.**

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Now state as near as you can recall the conversation between you and Mr. Strickler upon that occasion with reference to that particular subject, that is to say upon the subject of Mr. Broyles' financial responsibility and his general financial condition?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings and that it is immaterial after the witness had signed the notes as to what representations were made.

I submit that they ought to prove the date that the notes were in the possession of the bank at that time.

Overruled.

Exception.

Question repeated. Now state as near as you can recall the conversation between you and Mr. Strickler upon that occasion with reference to that particular subject, that is to say, upon the subject of Mr. Broyles' financial responsibility and his general financial condition?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings and that it is immaterial after the witness signed the notes as to what representations were made.

Overruled.

Exception.

A. I asked Mr. Strickler Mr. Broyles' financial circumstances and told him why I wanted to know; that I had signed some paper four months prior, four months ago that was understood to be accommodation notes—that was four months any how—whether they 190 were due or not; I do not remember the dates, and that now he was coming with some other notes and that I myself was pretty heavily involved in an irrigation proposition and that if Broyles wasn't all right that I would have to keep off of the paper or stop work.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. What did Mr. Strickler tell you?

Same objection to this. Incompetent, irrelevant and immaterial and not in conformity to the pleadings; and that it is immaterial after the witness signed the notes as to what representations were made.

Overruled.

Exception.

A. Mr. Strickler says that Mr. Broyles is the strongest man in that country, and I agreed with him certainly because I thought so myself.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Subsequently to the time of that conversation did you see those notes in Mr. Broyles' Bank at San Marcial?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir; I had only signed two of the notes and the next time they had another one there for ten thousand more.

Move to strike out as incompetent, irrelevant and immaterial under the allegations of the defendant's answer.

Overruled.

Exception.

Q. Had any other signatures been added to those notes when you next saw them in Broyles' Bank?

191 Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. When was it you next saw them in the bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I guess it was the eighth or ninth, eighth of April I guess—ninth I guess.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Did you look at them at that time sufficiently to be able to state whether or not the words "on demand" had been written in them?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I don't think the notes had been changed any only signed by other signatures, the notes were just like when I seen them with the exception of putting more names on them.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

## 192 Cross-examination.

By Mr. FITCH:

Q. You say that when Mr. Strickler made the statement that he thought Mr. Broyles was the strongest man financially in that part of the country you agreed with him?

A. Yes, sir.

Q. And at that time you had already signed these notes same several days before had you?

A. I think I had signed two of them the day before.

Q. You have known Mr. Broyles very well for many years haven't you?

A. Yes, sir.

Q. He has accommodated you financially?

A. Yes, sir.

Q. In fact you are indebted to him over ten thousand dollars now are you not Mr. Brown?

A. No, sir.

Q. Don't mean to say you don't owe him that on notes and over drafts?

A. I don't.

Q. How much is it?

A. Oh it is around, it's over six thousand dollars.

Q. He has accommodated you, in other words has he not by going on paper, on notes as endorser for you?

A. Yes, sir.

Q. And you were perfectly willing to help him out by signing these notes were you not?

A. I considered it an honor if Mr. Broyles was all right, as I thought he was, and that was my object in asking Mr. Strickler. If he wasn't all right why that it was an honor to help J. N. Broyles any way that you could provided he was all right.

Q. Then you say you believed he was all right when you signed the notes, the first two notes?

A. I thought he — all right when I signed them all three.

Q. Were the notes that you signed first, the two notes in this suit or not?

A. The five thousand dollar note is but I don't know if the ten thousand dollars—I cannot tell the ten thousand dollar notes apart.

Q. So you don't know whether you signed that ten thousand dollar note that—is—the suit is brought on here before or after you saw Mr. Strickler?

A. No, I don't. I didn't consider it made any difference. I wasn't going to let the notes go in the bank unless the bank was going to take care of them.

By Mr. FITCH: Move to strike out the last part of the answer as not responsive.

Sustained.

You will not consider what the witness said about him not going to let the notes go into the bank.

Redirect examination:

Q. Did you intend to let the notes go into the bank unless you were assured by Mr. Strickler that Mr. Broyles was all right financially?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Objected to as to the intention of the witness.

Overruled.

Exception.

A. No, I didn't intend for the notes to go in the bank unless Broyles was all right. Everybody seemed to be in the hole at that time.

That is all.

Move to strike out as incompetent, irrelevant and immaterial and immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Move to strike out the last part of the answer.

Stricken out about what everybody's condition was.

Everybody seems to be in the hole about that time.

By Mr. HOLT: That is our case with the exception of one witness who will testify to certain facts we understand your Honor has ruled out as being inadmissible, but for the purpose of saving time we will make the offer of what we expect to prove by the witness.

We offer to prove, may it please the Court, by the witness Charles N. Crossman one of the defendants in this case, that he signed this note—these notes sued upon at the request of J. N. Broyles 194 and was induced to sign the same by virtue of representations made to him by Mr. Broyles acting in the capacity of an agent, as we claim the same is established by the proof in this case, for the Bank of Commerce, to the effect that it was purely accommodation paper; that it was amply secured by collateral and that the signers would never be called upon to pay it, and would never hear of it again.

And we further offer to prove by the witness referred to, that Mr. Broyles at the time represented to him that he had these notes which the Bank of Commerce desired him to get signed up and that the Bank of Commerce had promised to carry the notes for him and that the Bank desired him to get as many names as he could so the notes would look good; and that they were given as renewals of other notes to cover an indebtedness which Broyles then owed to the Bank of Commerce, which conversation occurred on April 3, 1908. That subsequently, upon the same day, Broyles in reply to an inquiry from the witness Crossman as to whether or not these notes were renewals, Mr. Broyles stated to him that the notes were to help him out—help him, Broyles, and that the Bank of Commerce had agreed to carry them.

Offer denied.

Exception.

And further offer that at the same time——

Counsel for defendants further offer to prove by the witness Crossman that during the conversation, above referred to between him and Broyles, Broyles told Crossman that he had over thirty thousand dollars' worth of collateral in the Bank of Commerce to secure the payment of said notes.

Offer denied.

Exception.

Our case, with the exception of the letter from Mr. Broyles which we requested the counsel to produce, is closed.

By PLAINTIFF: For the purpose of saving time we reserve our right when your evidence is all in to move for a verdict under the instructions of the Court. We might introduce such evidence as we have in rebuttal if it is agreeable to the other parties.

Defendants rest with the exception of the latter.

Mr. JOHNSON recalled on rebuttal.

Direct examination.

By Mr. FITCH:

Q. Mr. Johnson you are the assistant cashier of the Bank of Commerce the plaintiff are you not?

A. Yes, sir.

Q. How many times have you been in San Marcia??

A. I think about three, possibly four, but three I think.

Q. When was the first time as near as you can recollect?

A. In November.

Q. Last year?

A. Last year, 1907.

Q. How long were you there at that time?

A. I think about two days, may have been a day longer. I think it was two.

Q. When were you there next?

A. I think it was in February.

Q. Have you got any memoranda with you which would show the date?

A. Yes, sir; that is what I have got.

Q. Have you got a memoranda?

A. Yes, sir.

Q. Made at the time?

A. Yes, sir.

Q. I will ask you to look at that memoranda and state if you can the exact date you were there in February?

A. February 18th—wait a minute, let us see, I think it is the eighteenth, that memorandum is not here.

Q. That is it. See if that is it?

A. Yes, sir; February 18th.

Q. How long were you there at that time?

A. I think about some time—all were short visits.

Q. When were you down there again?

A. On April ninth.

Q. Were you down there more than once in April?

A. No, sir; I think not.

Q. Mr. Johnson in any of these visits did you attempt to make or make an investigation of Mr. Broyles' business affairs for 196 the purpose of determining or ascertaining his financial standing?

A. Only in a perfunctory manner.

Q. When was that.

A. February.

Q. Visit in February?

A. Yes, sir.

Q. Just state how that examination was conducted or how it was made, who was present?

A. Shall I state the reason that I went down?

Q. Was it in connection with obtaining these notes that are now in suit?

A. No, sir. Simply to protect ourselves on money that we had sent down, that is to say the checks came back.

Q. Well now go on and answer my question please?

A. Why Mr. Broyles was present part of the time, part of the time Lawrence Broyles, and some of the figures were gotten from Mr. Woodward.

Q. Who was Mr. Lawrence and Mr. Woodward?

A. Mr. Woodward is one of the men that runs his books I think or did run his grocery books and Lawrence is his son.

Q. In his employ there in the store or the bank?

A. He was in the store and bank I suppose.

Q. State whether or not during your—or at the close of that examination you made a memorandum as to what you had ascertained?

A. I did.

Q. Is that it there?

A. That is it.

Q. State whether it is correct or not with reference to what you ascertained at that time.

A. Why the figures that I went over personally I think are correct.

Q. That is that you went over yourself from the books?

A. Yes, sir; approximately correct then any way.

Q. Now state to the jury what—what items you ascertained from the books yourself and how much they were.

Objected to unless he can state as to the correctness of those items. I don't think that is sufficient to allow a witness to testify from a memoranda.

Objection is well founded. He has not testified that the items which he personally took from the examination which he  
197 made are correct, he says approximately.

Exception.

Q. What did you mean by approximately correct?

A. Well we have—possibly would not take them off to the cents, take off, call off the dollars, thousands and hundred.

Q. Do you mean you didn't take down the cents possibly in all cases?

A. No.

Q. How about the dollars?

A. Well in a great many cases I took them all down by adding them up first and giving the total to the machine, say ther- was 10, 5, 7, I would add those up and say 17 or 22 as the case might be.

Q. Then I understand that you did add in the dollars and tens of dollars?

A. Oh, yes, sir.

Q. And that when you say they were approximately correct, simply mean that in all cases the cents were not added in is that it?

A. Yes sir; I should think you might take it that way.

Q. Well is that correct?

A. Well I told you one of the principal reason- that I know that it is that I have got it that way is that they are in even numbers and I don't think that I went into it close enough to come within 100, 150, 200 dollars any way.

Q. But you are certain they are correct without 100 or 200 dollars as taken from the books?

A. Yes, sir; I think I am.

Same objection renewed.

Unless he can state as to the correctness of those items, I don't think that is sufficient to allow a witness to testify from a memoranda.

By the COURT:

Q. Now Mr. Johnson are you within 100 or 200 dollars correct, are you that close to being absolutely correct about the items which you just personally took from the books?

A. I would not say that positively, judge.

By Mr. FITCH:

Q. Well how near would you say you were?

A. As I told you before that I took these off in a kind of  
198 perfulatory manner. I didn't go down with the purpose of  
auditing the books, but I say as I said before that they are ap-  
proximately correct, may be twenty-six, may be twenty-six thousand  
five hundred deposits.

Objection renewed.

Sustained.

Exception.

Q. Mr. Johnson will you state when you say that that is approxi-  
mately correct how far it may be either more or less than abso-  
lutely correct and how many dollars what would be the just—the  
items you took from the books. Understand my question.

I will put it another way. Are the amounts as you took from  
the books within five per cent of being correct?

A. I could not say at all on that. Let me see the memorandum.

Question withdrawn.

By Mr. DOUGHERTY:

Q. Point out the items Mr. Johnson that you yourself took from  
the books that is on this memorandum.

Object to this question.

—. Please point out what items, if any, you yourself either took  
or assisted in taking from the books at the time that you say you  
made the examination.

Objected to. Cannot point out any items. This has been ruled  
upon. The court has ruled out with reference to this memoranda.

On the first page of the memoranda I refer to.

Objection overruled.

Exception.

Q. Just call them by numbers here all this first.

A. The amount of money?

Q. Take this first item coming down, what ones did you yourself  
take or assist in taking?

A. Bank deposits No. 1 due on open accounts and the over draft  
on bank.

Q. Now Mr. Johnson approximately within what per cent would  
you say would cover the correctness of that, that is as taken by you,  
that is what the greatest limit that you would put as to the accuracy?

A. I should say about five per cent.

Q. They would not reach ten per cent then if I understand  
you?

199 A. I would think not.

Q. Well can you or can you not say that it is within ten  
per cent as being correct as taken by you?

A. Yes, sir.

Q. Now this item that you marked due open accounts, state what per cent that that was or was not correct as taken by you giving the margin that you know that you are within?

A. Ten per cent.

Q. How about the amounts due other banks, over drafts, what per cent there?

A. I say about five on that.

Q. Then if I understand you Mr. Johnson on the item marked bank deposits and on the item marked due open accounts this memorandum made by you at the time you can swear is within ten per cent as being correct as shown by the books at that time?

A. Yes, sir; I should think so.

Q. And the amount marked over drafts is within five per cent?

A. I should think it was.

Q. Now this is the original memoranda which you made at that time?

A. Yes, sir.

Q. This second item on this memoranda marked merchandise account of merchandise under the head of liabilities \$2,000, did you make that up yourself or did you obtain that statement from Mr. Broyles?

A. From Mr. Broyles.

Q. The third item marked Bank of Commerce is the notes of the bank are they?

A. Yes, sir.

Q. The fourth item marked State National Bank thirteen thousand dollars in the amount due to the State National Bank of Albuquerque as given to you by Mr. Broyles is it?

A. Yes, sir.

Q. Under the head of resources the first item which you marked stock thirty-five thousand dollars is an estimate that was made by Mr. Broyles is it?

A. Yes, sir.

Q. And the property marked millsite under mill electric  
200 light and etc. forty-five thousand dollars where did you obtain that information as to the value?

A. Mr. Broyles.

Q. This account marked correspondents eighteen hundred dollars where did you obtain that information?

A. Mr. Broyles.

Q. And the amount marked wheat three hundred thousand pounds four thousand five hundred dollars?

By Mr. FALL:

It is proving contents of this memoranda. I understand it has been ruled out by the Court. It is all going to the jury.

By the COURT: There has been absence of objection to this. I stated that there was no attempt being made to ascertain the validity of this memorandum, as a source of refreshing the memory of this witness.

By Mr. FALL: I didn't understand the Court expected counsel to

make objection to statements being made now over the ruling of the Court.

Move to strike from the record and to take from the jury all the questions and answers propounded touching this paper.

Sustained.

Exception.

By the COURT: You will not consider what this witness has testified thus far as to the amount expressed in this memorandum of various items therein mentioned.

Q. Mr. Johnson at the time that you made an examination of Mr. Broyles' books, touching the third item, did or did not Mr. Broyles give you a statement or stated to you the amounts and values of the other classes of property which he had in San Marcial?

A. He did.

Q. Can you state what they are from your recollection, without that memorandum can you state what they are?

A. Electric light plant, some houses that he owned.

Q. Can you say the amounts?

A. No, sir.

Q. State whether or not at the time that he gave you the amounts if you made any memorandum of those amounts and if they are accurately stated in that memorandum as he gave them to you—as he gave them to you?

A. Yes, sir; they are.

201 Q. I will ask you to refer to that memoranda if you have them and state what the amounts were that Mr. Broyles gave to you, the items and amounts?

A. You mean upon the properties.

Q. Upon everything touching his accounts there at that time.

A. Forty-five thousand dollars on the properties and real estate.

Q. That was upon. What did he give you as the value of his stock of merchandise?

A. Thirty-five thousand.

Q. What amount did he give you as due from correspondents?

A. Eighteen hundred dollars.

Q. What did he give you as the amount of wheat on hand?

A. Three hundred thousand pounds at a cent and a half.

Q. What did he give you as the amount?

A. I figured out the amount myself, \$4,500 the value was.

Q. Now the last two items upon the memorandum which you made at that time are amounts which you yourself took from the books and which you testify are within ten per cent of being correct?

A. Yes, sir.

Q. What is the amount upon open accounts?

A. \$17,500.

Q. What is the amount upon over drafts?

A. Eighty-seven hundred and fifty-five dollars.

Q. What is the total amount of his resources if you have it as given to you?

A. \$112,555.

Q. Now under the head of liabilities the first item is bank deposits which you have sworn you took from the books yourself and as being within ten per cent of being correct, what is the amount of the bank deposits?

A. Twenty-six thousand dollars.

Q. The other items are items as given to you by Mr. Broyles?

A. Yes, sir.

Q. What is the amount of the merchandise account, that is how much he owed for merchandise?

202 A. Two thousand dollars.

Q. What is the amount as given to you by him as due the Bank of Commerce on note?

A. Twenty-five thousand dollars, but that I knew you know.

Q. Well what was the amount of over draft to the Bank of Commerce?

A. Seventy-five hundred dollars.

Q. Did you know that at that time?

A. No, it was approximately. I didn't put down the dollars and cents of each, somewhere around seventy-five hundred dollars.

Q. What was the amount of the State National Bank debt as he told you at the time?

A. Thirteen thousand dollars.

Q. What was the total amount of his liabilities from those figures as given?

A. Seventy-three thousand five hundred dollars.

Q. There is a matter which I overlooked at the bottom here, what is this?

A. Notes, etc.

Q. That is under the head of liabilities or resources?

A. Resources.

Q. What was the amount of that?

A. Thirty-five thousand dollars.

Q. And what is the next item?

A. Old accounts and interest.

Q. You — testifying now what Mr. Broyles told you or your own figures; are these your own figures or what Mr. Broyles told you?

A. What Mr. Broyles told me.

Q. This thirty-five thousand on notes is just what Mr. Broyles told you at that time?

A. Yes, sir.

Q. And these old accounts, is that from your own examination or from what he told you?

A. No, it is from a collection agency; papers that a collection agent was to collect at a certain percentage and he figured out the percentage and all that kind of business and I took the figures from that paper.

By Mr. FALL:

Q. You say you simply took them from some paper, published paper?

203 A. No, this man had been through those old accounts; he was going to adjust them that he could and he had the list there and I got it from that.

Q. Who had the list, the agency agent?

A. I think it was Mr. Broyles' office. The agent was the man that went there.

Q. You got your information from a paper which Mr. Broyles handed you and claimed a collection agent had figured out?

A. The collection agent was there too.

By Mr. DOUGHERTY:

Q. The collection agent was there at that time?

A. Yes, sir.

Q. What is the total of those two amounts that you have just mentioned; what was the total of these two?

A. Forty-eight thousand.

Q. Now taking Mr. Johnson the amount of liabilities including those that you examined and those that Mr. Broyles—you depended upon the information conveyed by Mr. Broyles from the liabilities—from the resources ascertained in the same manner what did it leave net worth?

A. Eighty-seven thousand no hundred and fifty-five dollars.

Q. This statement, if I understand you, was made on February eighteenth?

A. Yes, sir.

Q. Or this memoranda?

A. Yes, sir.

By Mr. FITCH:

Q. Was any representation or statement made to you by Mr. Broyles at that time as to whether this—the item of notes of the value of forty-five thousand dollars were good or not?

A. I have no recollection of it.

Q. State Mr. Johnson whether at the time you made this examination you had any doubt as to its being substantially correct within ten per cent?

A. Not the slightest.

Q. Did you ever make another examination?

A. No, I don't think I ever did.

Q. Mr. Johnson you say when you were—went down at San Marcial with reference to these books—to these notes is that so?

204 A. Yes, sir.

Q. Did you take these notes down there in the first place?

A. No, sir.

Q. How were they sent down in the first place?

A. Sent down by Mr. Broyles.

Q. Did he get them at the bank?

A. That is my recollection.

Q. State whether or not they were returned to the bank.

A. My recollection on that point is that Mr. Broyles brought them back himself.

Q. Did you see them after they were brought back by Mr. Broyles?

A. Well I don't think I saw them until I took them down again.

Q. How long did Mr. Broyles have them before he returned them or brought them back the first time?

By Mr. FALL: The witness says he doesn't remember.

A. I don't recall that.

Q. Well approximately?

A. I don't recall that.

Q. Well approximately?

A. Approximately I say a week.

Q. You say he brought them back and that thereafter you took them down there yourself?

A. Yes, sir.

Q. How long were they in the bank approximately in the bank there from the time Mr. Broyles brought them back until you took them down?

A. I should say about two days. I am not quite positive on that but I think about two days.

Q. You recollect of Mr. Ed Brown being up there?

A. Yes, sir; he was there.

Q. Having a talk with Mr. Strickler?

A. Yes, sir.

Q. State whether these notes were in the bank there at the time of Mr. Brown's visit?

A. Yes, sir; they was.

Q. Now Mr. Johnson when you took them down to San Marcial did you notice what signatures were on them?

A. Yes, sir.

Q. By whom had they been signed? (Hands the witness notes.)

205 By Mr. FALL: Is the witness testifying from the notes or from his knowledge?

Objected to as not proper rebuttal testimony because he went over this ground with this witness when he had him on the ground before.

By the COURT: I should think he would be required without the use of the notes if he can. Proceed.

Q. Can you state then without looking at the notes what names were signed to them at the time you started for San Marcial with them.

A. Yes, sir.

Q. Who were they?

A. J. N. Broyles, Schmidt and Story, Mr. Crossman and E. W. Brown.

Q. For what purpose were you sent by the bank to San Marcial with these notes?

A. To get Mr. Broyles to secure the original signers.

Q. What were their names?

A. Messrs. Evans and Anderson.

Q. Were you sent there for *what* any other purpose?

A. Yes, sir; for any other signers that Mr. Broyles could get.

Q. Any particular persons?

A. Yes, sir; there was three names mentioned by Mr. Broyles when he was in the bank specially.

Q. Well were they the names of any of those parties there?

A. Yes, sir.

Q. Which one?

A. Mr. Lewis.

Q. State whether or not when you took those notes to San Marcial the blanks had been filled out, the blank spaces?

By Mr. FALL: He can testify to that without examination of those notes. (Notes handed to the witness and then withdrawn.)

Q. State whether the blanks were filled up on those notes?

A. They were according to my recollection.

Q. When you took them to San Marcial?

A. Yes, sir.

Q. Are you certain about that or not?

206 A. I am sure about that, yes, sir, that they were filled up when I took them.

Q. How about the words "on demand" state whether or not they were filled out at that time?

A. Yes, sir; "on demand."

Q. Do you recollect when or do you know who filled out those notes in the first place?

A. Yes, sir; I filled them out.

Q. When you took them down there who was the last man to sign those notes?

A. Mr. Anderson I think.

Q. What time of day was it he signed those?

A. Sometime in the afternoon.

Q. I will ask you whether you changed those notes or inserted anything in them at all after Mr. Anderson's signature?

A. No.

Q. It is in evidence I think that the first man that signed the notes when you were down there after you went down there was Mr. Evans, is that so?

A. I don't think so.

Q. Who was the first one?

A. I think Mr. Lewis was the first man.

Q. Had you ever met Mr. Lewis before?

A. I don't think I had. I may have seen him but I don't recollect ever meeting him before.

Q. Well where did you meet him that time?

A. At Mr. Broyles' office.

Q. Well did he come in there while you were there?

A. Yes, sir.

Q. Who came with him if anybody?

A. Mr. Broyles.

Q. Well go on and tell just what happened before he signed those notes. What statements did you make to Mr. Lewis, what statements, if any, did you make to Mr. Lewis while he was there as to Mr. Broyles' financial condition?

A. I don't recollect making any.

Q. Either before or after the signing?

A. Well I may have said something after, but I don't—if it was it wasn't in the store.

Q. Was that after he had left the store and after he had signed the notes that you had a talk with him?

A. I saw Mr. Lewis on the street afterwards and I may 207 have made some remark to him there but I haven't the slightest recollection of ever doing it.

Q. State whether or not you had any talk with Mr. Evans?

A. I had a few words' conversation with him, yes sir.

Q. Did you represent Mr. Broyles as being solvent to Mr. Evans?

A. Not before signing the notes.

Q. Well did you do it at any time?

A. I don't recall whether I did or not. We wasn't in there very long, had a little general conversation. I may have mentioned a little something about it afterwards.

Q. Did you make any representations to Mr. Anderson?

A. Not according to my recollection.

Q. About the solvency of Mr. Broyles?

A. No, sir.

Q. Either before or after?

A. I might have talked afterwards; we had quite a talk afterwards.

Q. Mr. Johnson what was your honest opinion at that time as to whether Mr. Broyles was solvent or not?

A. I believed Mr. Broyles to be perfectly solvent.

Q. What was your belief as to how much he was worth over all debts and liabilities?

A. Anywhere in the neighborhood of fifty thousand dollars.

Court in recess until eight o'clock.

Q. Mr. Johnson do you know the reason why the suit was commenced on these notes at the time it was?

A. On account of the—

Q. Do you know; I asked you if you knew?

A. Yes, sir.

Q. Why was it?

Objection is made that under the former ruling of the Court the testimony is incompetent, irrelevant and immaterial, but counsel will withdraw the objection provided the Court rule that they may be allowed to go into this question on cross examination and on rebuttal. This is new evidence that is being brought up. We have no objection to it if we are allowed to go into it.

Objection overruled. The broadest cross examination will be allowed.

208 Q. What were the reasons that this suit was brought when it was brought?

A. On account of Schmidt and Story signing a note for sixteen thousand dollars and giving a mortgage upon their sheep—cattle whatever it was after signing of this note and thus impairing our security.

Q. Was there any other of the defendants that signed this note that you speak about?

A. Not that I know of. I only understood the one part. I only heard the one party mentioned; talked it over casually.

Cross-examination.

By Mr. FALL:

Q. Mr. Johnson when was this Schmidt and Story note signed for Mr. Broyles?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. On you mean our note?

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. No, sir; you have testified that the signing of another note and the execution of a mortgage by Schmidt and Story was the cause of your bank bringing the suit in this case, haven't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Well was this—when was this note signed and this mortgage made by Schmidt and Story which you say was the cause of your bank bringing this suit?

209 Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I could not tell you the date.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. That you do not know?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I do not know.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of *of* the defendant's answer.

Denied.

Exception.

Q. As a matter of fact you know nothing about the cause of the bringing of this suit except as you have stated from casual observation do you?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Talked the matters over with Mr. Strickler.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Didn't talk it over with your attorney did you?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Well I don't know that I did specially; possibly Mr. Strickler did.

210 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. You know that you talked over this answer which you have just given to Mr. Fitch- question, or you have just made to Mr. Fitch's question with these gentlemen since the adjournment of court yesterday afternoon don't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Yes, sir; possibly I have, but I knew the facts before.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Now when was this suit brought?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I do not know the date.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. The Schmidt and Story note which you say was the cause of bringing this suit was made prior to the bringing of this suit wasn't it; I mean the note that you say that was the cause of the bringing of this suit, I don't care what you call it.

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I could not say that. If I didn't recollect the date when the note was signed how could I tell?

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

211 Denied.

Exception.

Q. If this note which you say was the cause of the bringing of the suit wasn't made prior to the bringing of the suit how could it cause the bringing of the suit?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I presume it was.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Well do you know it was?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. I know nothing about the fact when the suit was brought at all any more than I know that it was the signing of that note that caused us to bring the suit.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. How do you know that?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. From general conversation.

Move to strike out as incompetent, irrelevant and immaterial and immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Now then where did that fifteen hundred dollars come from that you applied as a credit on that note, from what funds?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

212 Overruled.

Exception.

A. Know nothing about that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of *of* the defendant's answer.

Q. You don't?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of *of* the defendant's answer.

Denied.

Exception.

Q. Don't you know as a matter of fact as an absolute fact that this fifteen hundred dollar credit which you applied on this note was obtained by your bank from the funds which were obtained by the Schmidt and Story note that you are testifying to?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I didn't get the money; how should I know.

Move to strike out as incompetent, irrelevant and immaterial; and immaterial under the allegations of *of* the defendant's answer.

Motion denied.

Exception.

Q. Don't you know?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. No, I don't know what funds it came from.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. Don't you know it from just the general conversation  
213 that you had exactly as you know about the bringing of this suit?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. I know it came from Broyles' bank; from what funds it came from I don't know.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied.

Exception.

Q. Don't know that it came from those particular funds that I have mentioned just as well as you know anything about the cause of the bringing of this suit and in the same way?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. No, sir; I don't.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Now that fifteen hundred dollars that was applied as credit on this note you say that you do not know what fund it came from?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. No, sir; I know it came from money that Mr. Broyles had there but how should I know what fund it came from?

Move to strike out as incompetent, irrelevant and immaterial and immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Funds that Mr. Broyles had where?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

214 A. Down in his bank.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Down in his bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. It was paid through his bank was it?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. That is my understanding.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. What is that?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. That is a draft on the Bank of Commerce.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Bank of Commerce?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; and immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Whose draft?

215 Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. J. N. Broyles.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. What is the amount?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. Well it is—the amount of the check is fifteen hundred dollars.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. What did that go for?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. On account of note five thousand dollars.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Then this fifteen hundred dollar credit came through a check on your bank did it?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; not material under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And still you are not in charge of the funds as assistant cashier of your bank and you don't know what funds that fifteen hundred dollars was paid out of?

216 Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. I don't think—I am not sure that any ever came through my hands at all. I don't know.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Now don't you know as a matter of fact just as well as—just by the same source of information that you know anything about this suit that Mr. Strickler went to San Marcial and brought fifteen hundred dollars in cash which was part of the funds obtained on that Schmidt and Story note to which you have testified about, put those funds in the bank to Mr. Broyles' credit. Mr. Broyles gave this check on those funds, on those particular funds and that it was paid by your bank and applied as a credit on these notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. If, as you say, Mr. Strickler got the fund for that particular check, that particular check would be left down there and would never come through my hands, you understand that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Then as a matter of fact upon oath you say that if Mr. Strickler did get these funds from this Schmidt and Story note or any other source at San Marcial that this check wasn't paid out of those funds?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. No, I don't say any such thing. I don't know what funds they were paid out of.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

217 Q. Didn't you just state to me that I knew that if Mr. Strickler had gotten those funds down there and this check had been paid by those funds that it never would have come through your bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. The check never would.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Then as a matter of fact this check wasn't paid out of any such funds?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED and exception.

A. I don't know how the check was paid.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

DENIED and exception.

Q. But you just said it could not have been.

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED and exception.

A. I said it would not come through my hands if the funds was given for the check down there at San Marcial; Mr. Broyles would keep the check and it would not come up to the bank. Our records would show whether that check ever passed through my hands or not.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Does not this check bear any evidence of ever having passed through your hands?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED and exception.

A. If you look at that little statement of mine you will see whether that check has been passed through my hands.

218 Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Will you kindly now answer as to whether that check from any marks on the check bears evidence of having passed through your bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED and Exception.

A. Yes, sir; it does.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now you say that there has been no payment of any kind whatsoever upon those notes, these notes sued upon except this fifteen hundred dollars?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. That is my recollection.

Move to strike out as incompetent, irrelevant and immaterial; and immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. What is that?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. That is interest.

Move to strike out as incompetent, irrelevant and immaterial; and immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. On what?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. Twenty-five thousand dollar notes.

219 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. What is the date?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled. Exception.

A. 4-16 it says here.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. April the 16th?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. How much is the amount of the check?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. One thousand dollars.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied. Exception.

Q. Does that show on these notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. It would not show on the notes.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Did you deduct the interest from the face of the notes?

220 Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled.

Exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Didn't?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. The notes as made for twenty-five thousand dollars were not filled out for twenty-five thousand dollars were they?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Those notes were made and delivered to you on April 9th, or 10th and on the 16th you got Mr. Broyles' check on your bank for one thousand dollars and you paid it and marked in pencil on it, interest on the twenty-five thousand dollar notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir; we didn't mark it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

221 Q. You didn't?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. No, sir; it is not our writing.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You don't know what that one thousand dollars was for?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. You just stated it was for interest on notes didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. Simply from the writing on it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. That is the only way you know it?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. That is the only way I know it; our records will show what it was for.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. But very fortunately for yourself you haven't brought your records here have you?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

222 OVERRULED AND EXCEPTION.

A. No, sir; our records are clear.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And you are much more clear in testifying away from them, this far from Albuquerque than you would be if you had them here?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED AND EXCEPTION.

A. No, sir; I would like to be able to look those two checks up on our records.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Now you say as I understand that you first went to San Marcial in November of 1907; what business did you have in San Marcial in November of 1907?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED AND EXCEPTION.

A. Well I think I went up there—sure about it, I think I took down money for pay rolls.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Pay rolls for what?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED AND EXCEPTION.

A. Santa Fe pay rolls.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You had no business with Mr. Broyles at that time?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

223      Overruled and Exception.

A. I don't recall what other business I had.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. And you don't recollect what business carried you there?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

—. Not definitely, No.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Q. How long have you been connected with the Bank of Commerce?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. Number of years, ten or twelve.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Ten or twelve years; how long have you known Mr. Broyles through business association or otherwise?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. Well through business association ever since he did business. I don't recollect the date when he first started.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. That is ever since he did business with the Bank of Commerce.

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

224      A. Not personally but through business.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. That is what I asked you. And you have been with the bank for ten or twelve years?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED AND EXCEPTION.

A. Yes, sir; maybe longer.

MOTION TO STRIKE OUT AS INCOMPETENT, IRRELEVANT AND IMMATERIAL UNDER THE ALLEGATIONS OF THE DEFENDANT'S ANSWER.

DENIED AND EXCEPTION.

Q. And Mr. Broyles has been doing business with that bank practically throughout that entire time has he not?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED AND EXCEPTION.

A. Yes, sir.

MOTION TO STRIKE OUT AS INCOMPETENT, IRRELEVANT AND IMMATERIAL UNDER THE ALLEGATIONS OF THE DEFENDANT'S ANSWER.

MOTION DENIED AND EXCEPTED.

Q. And you have been carrying Mr. Broyles for about twenty-five thousand dollars indebtedness during the greater portion of that time haven't you, the bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED AND EXCEPTION.

A. No, I think not as much as that.

MOTION TO STRIKE OUT AS INCOMPETENT, IRRELEVANT AND IMMATERIAL UNDER THE ALLEGATIONS OF THE DEFENDANT'S ANSWER.

DENIED AND EXCEPTION.

Q. Well how long?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED AND EXCEPTION.

A. Well it has gradually crept up. I could not say how long. I never looked into the records especially to see.

225 MOTION TO STRIKE OUT AS INCOMPETENT, IRRELEVANT AND IMMATERIAL; IMMATERIAL UNDER THE ALLEGATIONS OF THE DEFENDANT'S ANSWER.

DENIED AND EXCEPTION.

Q. Well more or less?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

OVERRULED AND EXCEPTION.

A. Oh several years for the twenty-five thousand.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. You carried him for twenty-five thousand dollars for several years?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. How was that twenty-five thousand dollars represented in your bank during these years?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. By notes.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion sustained and exception.

Q. What kind of notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. Personal notes.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Of Mr. Broyles?

226 Objected to as incompetent, irrelevant and immaterial and not conformity to the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. That it?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now you say that you went back to San Marcial in December, or did you say that?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. I could not recollect whether I was there in December or not.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Except-ed.

Q. You do recollect positively that you were there in the month of February of this year?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Was it upon this occasion that you took from Mr. Broyles' bank and put into the Bank of Commerce certain collateral security?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

227 Overruled and Exception.

A. I don't recollect that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer

Motion denied and Exception.

Q. Now Mr. Johnson try and refresh your memory; you went down there you have testified here for an hour yesterday evening or more as to what you did in the matter of examination into Mr. Broyles' affairs etc. You remember memorandum which you have and which you had in your hands last night, you remember sums of money which were stated as being due Mr. Broyles and sums which you found due from him, and you were there on business of this bank as I understand, your bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Concerning Mr. Broyles' business and his financial standing that was it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Not all together.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Well then what else?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. On the same object that I went down before—take money for pay rolls.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

228 Q. I am not speaking of pay rolls; I am speaking of your business with Mr. Broyles. I have only called your attention to your business with Mr. Broyles.

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. Well that was my ostensible business with Mr. Broyles.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Was this pay roll business for Mr. Broyles?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Most assuredly it was for Mr. Broyles.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Wanted to know that awhile ago and you said it was not on

business for Mr. Broyles when you were there in November, it was to take rolls for the Santa Fe—Santa Fe Railroad.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. That is kind of turning the words around. If Mr. Broyles wanted six thousand dollars taken down or five thousand dollars or two thousand dollars to meet his pay rolls it is partly for Mr. Broyles' benefit we take it down so that he can cash those checks.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Now as a matter of fact you know and you knew when you testified that when you went there in November that you didn't go on Broyles' business, you know now and you know then that it was absolutely on Broyles' business and that you had nothing 229 to do with the Santa Fe Railroad pay rolls don't you; that you were simply taking money down there for Mr. Broyles, that is a fact is it not?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. We had nothing to do with the Santa Fe Railroad but we were one of the depositories of the Santa Fe Railroad and we help them out wherever we can.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Now you say that you were there with reference to Mr. Broyles' indebtedness to the bank, investigating his financial condition and also taking to him certain moneys from your bank so that he might cash the checks which the Santa Fe Railroad issued on its employés?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. That is what my recollection is every time I went down except the last.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Your business there then was with Mr. Broyles?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Why of course to a certain extent.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Well now you didn't stay there and cash these checks yourself for the Santa Fe Railroad did you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. No, I didn't.

230 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You turned the money over to Mr. Broyles didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Assuredly.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. And he was supposed to cash the checks for the Santa Fe Railroad?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now Mr. Johnson you have a clear recollection of that portion of the business, do you remember that you at that time took from Mr. Broyles' bank notes of other parties which were held by Mr. Broyles and took them back with you to Albuquerque at this time that he has been testifying to in February?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. No, I don't recollect that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Did you on any of your trips to San Marcial take from Mr. Broyles' bank or from his bills receivable files and deliver to the Bank of Commerce notes held by Mr. Broyles due to him from other parties?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

231 Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. When did you do that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Cannot recollect specifically dates but I suppose any time I was there I might have done so if he had any collateral he wanted to give us. I have a little memorandum he had will show some collateral marked down on it in my own hand writing—in my own hand writing.

Objected to as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. You have no little memorandum which you could refer to and fix those dates have you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Now Mr. Johnson when you told Mr. Fitch yesterday in answer to his question that you were going down—that you went down to San Marcial in February to take some money or to look after some money, you said it was because some checks had been r-turned didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Not my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

232 Q. And you asked Mr. Fitch if he wanted you to tell all, didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. May have said it I don't recollection now exactly.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Will you tell us all; what did you go down there for at this time, what was the cause of your taking that money down there?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. To get the full amount of money returned in checks.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. What amount of money was it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I could not say exactly.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. More or less?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. The average amount that we had been taking down.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. More or less what was the amount you took at this time?

233 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. From four to six thousand dollars.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. It is a fact it was six thousand dollars is it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. May possibly have been six.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now why didn't you send that money to Mr. Broyles by Wells Fargo or some other express?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. We did send it by express.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You did?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Then you didn't take it down?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Well sent it down payable to me.

234 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And not to Mr. Broyles?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. No, but Mr. Broyles got it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. But the Bank of Albuquerque, although you say that at that time Mr. Broyles was worth eighty-seven thousand dollars according to your honest belief under oath, would not trust him with six thousand dollars to pay for Santa Fe Railroad checks, but sent that money to San Marcial to you and then sent you along to see how it was handled, that is the fact is it not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. Argumentative and calling for a conclusion.

Overruled.

Exception.

A. Partly. I will tell you something about it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. All right go on and tell it.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Mr. Broyles got that money out of the express office and had that money in his charge. I didn't have it in my charge after I got there.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

235 Q. But you went there to see that the checks of the Santa Fe Railroad which he cashed were turned over to you, your bank didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. We didn't want to increase the over draft and we were determined not to do it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. That is what you went there to see wasn't it. I don't care what your reason—that is what you went there for?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Mr. Broyles was worth eighty-seven thousand dollars according to your honest sworn belief, according to your examination at this particular time and still your bank sent you along, not trusting him with six thousand dollars to see that he applied that six thousand dollars to certain specific purposes, that is the payment of the Santa Fe checks and then you took those Santa Fe checks out of his possession and took them back to your bank didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. How did it protect you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

236 A. He mailed them right there.

Move to strike out as incompetent, irrelevant and immaterial and not material under the allegations of the defendant's answer.

Denied and exception.

Q. And you stayed there to see that he mailed them didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. They were right there he could mail them or not. They were put in the box. I saw him do that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. And that was your business there wasn't it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir; but with all this I would like to make a little statement about some of those little things—showing conditions. You can join your co-counsel and make a speech to the jury after while.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You testified that you had no reason to believe at the time of the making of these notes and obtaining of these signatures that

Mr. Broyles was bankrupt or that he wasn't able to pay his debts, or words to that effect?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And still your bank had had from Mr. Broyles himself on February 28th a letter in which he says that he is having 237 the hardest time of his life to keep above the water, and that is a letter imploring help from your bank is it not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Wasn't that sufficient to put you on notice as to Mr. Broyles' financial condition?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. What did he say in the other part of the letter? that goes a long ways.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. I am perfectly willing for the entire letter to be read. He says he is worth so much money, that he can pay every cent he owes and that he can, that he is having the hardest time of his life to keep his head above water and that he wants you to loan him certain moneys in addition to the twenty-five thousand dollars which he already owed you and in addition to his over draft? That is practically the contents of that letter.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings and argumentative.

Overruled and Exception.

A. I didn't know whether it was put in the shape of a question. I would like to hear it. We certainly thought that Mr. Broyles was hard up for money, for ready money, but with all his various collateral that he had we thought that he was — perfectly sound condition.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.  
238 Motion denied and exception.

Q. So sound that you were not trusting him with six thousand dollars?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, we had nothing to do with the matter at all.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied.

Exception.

Q. Well why would you not trust him with the six thousand dollars?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Well for several times the understanding when we sent this money for pay rolls that the money or checks were to be returned in every case and in several instances the money or checks hadn't been coming back; it was not a loan to him at that time, it was simply an advance for a specific purpose, simply an advance for a specific purpose and when we carried out our part of the contract we wanted Mr. Broyles to carry out his.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And he hadn't been carrying out his part of the contract with reference to specific funds which you had trusted to his charge?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Not in several instances.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. That was what you meant by saying to Mr. Fitch yesterday that you went down there in February because checks had been coming back or had not come back?

239 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And now Mr. Johnson you say that you found among the resources of Mr. Broyles' thirty-five thousand dollars, according to Broyles' statement, as to value in notes. You examined these notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Never. I looked through possibly just took them like that and turned my finger over them but never looked them over any shape or extent; never looked through them note for note or anything of that kind.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Is it not a fact that you took over nine thousand nine hundred and ninety-seven dollars' worth of notes out of those notes about that time?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Motion denied and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. When did you take them?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I don't know as I ever took them.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

240 Q. You got them?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. Yes, sir; but I do not know that I took them.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Do you know that you didn't take them?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. I think in some instances Mr. Broyles sent them up.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Mr. Johnson I am asking you not about what you think that Mr. Broyles did but I am asking you the question—you certainly know whether you took any notes out of Mr. Broyles' bills receivable now or whether you didn't.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Several instances Mr. Broyles gave me some.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You went through his bills receivable in several instances and selected out of those bills receivable certain bills receivable didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Mr. Broyles would say, here is certain notes, certain bills receivable; and I would say, can I have those; and he would say, yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.  
241 Motion denied and exception.

Q. Well I haven't meant to insinuate that you took them any other way.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. No.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

By the JURY: I would like to know if those notes were taken out after the notes were signed by the defendants.

By Mr. FALL: The testimony adduced from this witness,—I haven't asked him anything subsequent to February twenty-eight; this is prior to the signing of these notes.

By Mr. DOUGHERTY: The evidence shows that there was not any notes taken out after that time. These is a stipulation that sets forth the dates of the notes when they were gotten and all about that; that it was agreed that there were no notes so far as we know taken by the Bank of Commerce after the signing of these notes but were taken before and the stipulation in effect shows that no notes were taken out after November.

By the COURT: It is agreed that they were not taken out after the signing of these notes so far as we know.

Q. Those notes that were taken out from time to time were among the notes mentioned by Mr. Broyles in his letter of February 28th and are not among the notes mentioned in this stipulation are they?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I don't know what notes were stipulated and I don't know when they were taken or anything about them any more than I took some paper up occasionally.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

242 Q. Well you didn't go there until November did you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I don't recollect that and I don't recollect the first time I went down at all. I think my first time was in November but I won't be positive.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And on several different occasions you went through the bills receivable asking Mr. Broyles if you could have certain notes; he turned them over to you and you took them to your bank, now is that the fact?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. No, I won't say exactly it was several occasions.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Well was it on any occasion?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. Attempting to go into some foreign matter about this; not proper cross examination and remote deductions.

Overruled.

Exception.

Q. Did you on any occasion?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. Attempting to go into some foreign matter about this; not proper cross examination and remote deductions.

Overruled and Exception.

A. Yes, sir, I know I did—could possibly have done it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

243 Court in recess.

Q. You knew you did obtain collateral from Mr. Broyles yourself?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Well I think I did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Did you or not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I would not be positive on that score, No.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. If Mr. Broyles testified positively that you did go through his bills receivable yourself in person in his bank in San Marcial and take therefrom such collateral as you wanted for your bank, so far as you know that statement is correct is that it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir; as far as I know.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Now Mr. Johnson you have testified yesterday as I understand you that these notes were in the bank several days before you took them to San Marcial?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. That is my recollection, yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. You went to San Marcial on what day with reference 244 to these particular notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I think it was on the evening of the eighth, night of the eighth, morning of the ninth.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Did you not know as a matter of fact that these notes were in San Marcial on the day of the seventh?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, I don't.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Allow me to refresh your memory; do you not know that Mr. Broyles was in Albuquerque on the day of the sixth and in your bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. You don't know that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and exception.

A. I don't know the date.

MOVE TO STRIKE OUT AS INCOMPETENT, IRRELEVANT AND IMMATERIAL; IMMATERIAL UNDER THE ALLEGATIONS OF THE DEFENDANT'S ANSWER.

DENIED and exception.

Q. Don't you know as a matter of fact that on the sixth from your bank Mr. Broyles telephoned from Albuquerque to Mr. 245 Story, one of the signers of this note asking him to wait for him in San Marcial?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and exception.

A. No, sir.

MOVE TO STRIKE OUT AS INCOMPETENT, IRRELEVANT AND IMMATERIAL; IMMATERIAL UNDER THE ALLEGATIONS OF THE DEFENDANT'S ANSWER.

MOTION DENIED and exception.

Q. Don't you know as a matter of fact that Mr. Story, one of the signers of these notes, signed the note in San Marcial on the seventh day of April?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and exception.

A. No, sir.

MOVE TO STRIKE OUT AS INCOMPETENT, IRRELEVANT AND IMMATERIAL; IMMATERIAL UNDER THE ALLEGATIONS OF THE DEFENDANT'S ANSWER.

DENIED and exception.

Q. Do you know that he didn't do it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and exception.

A. No sir.

MOVE TO STRIKE OUT AS INCOMPETENT, IRRELEVANT AND IMMATERIAL; IMMATERIAL UNDER THE ALLEGATIONS OF THE DEFENDANT'S ANSWER.

MOTION DENIED and exception.

Q. Then you do not know where these notes were from the third day of April up to the time that you took them to San Marcial?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and exception.

A. No, I don't; not positively, except possibly might have been in the bank, but I am not positive.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

246 Q. Well you testified under oath here positively yesterday afternoon that they were in the bank during that time didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Not positively, not to my recollection that I knew that positively.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Did you not, sir, testify to this jury under oath that at the time E. W. Brown went to the bank in Albuquerque that these notes were in the bank at that time?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

Q. That is my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Did you not state that they were then in the bank until you took them out yourself and carried them to San Marcial?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir; that is my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Then you are positive and so testify, as I understand it, that these notes could not have been signed by Mr. Story in San Marcial on the seventh?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. No, I am not.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Not positive?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I am not positive.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Now is it not a fact that you testified here yesterday afternoon that when you took these notes to San Marcial on the eighth that Mr. Story's name was at that time signed to those notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Certainly were when I took them down to San Marcial.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Then if they were in the bank when Mr. Brown was in Albuquerque prior to the seventh and remained in the bank until you took them down there they must have been signed by Mr. Story prior to Mr. Brown's visit to Albuquerque or else Mr. Story must have signed them in Albuquerque?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings. The question is unfair; the witness has explained himself that he knew the notes were in the bank at the time he left on the night of the eighth, the morning of the ninth and that his recollection was they were in the bank on the seventh but he didn't know; that they might have been in San Marcial.

Overruled and exception.

A. That is a natural inference; you could not make it any other way.

248 Move to strike out as incompetent, irrelevant and immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You testified that the body of these notes whatever filled out in writing are in your hand writing I believe, including the words "on demand," that is in your hand writing?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. You then prepared these notes yourself?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. When did you do this?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No recollection of the date.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. If you didn't know where these notes were, cannot testify positively as to when they came into the bank and are only positive with reference to what occurred when you had the notes in your possession taking them to San Marcial, how do you know when you filled them out?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

249 A. Well that I could not exactly say.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Is it not a fact that you didn't write in these blank spaces in these notes until after the eighth day of April?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Not according to my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Well what is your recollection now?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. My recollection is that the notes were filled out when they were originally made out.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. That is when the notes were made out they were made out?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. That was my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now Mr. Johnson at the time of the making out of these notes and their delivery to you or the delivery by you to the Bank of Albuquerque you say that at the time you regarded Mr. Broyles as honestly worth fifty thousand dollars more than his liabilities or honest-y regarded him as worth?

250 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I certainly did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. When did you deliver those notes to the bank, take them back to the bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Let's see—I think it was on Saturday, Saturday night I went back.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. What day of the month was that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. What date? I don't recollect the date. It was on Saturday.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Did you testify yesterday that Mr. Anderson signed those notes on the ninth?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Not to my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. When did he sign the notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

251 Overruled and exception.

A. Why either on the Thursday or the Friday I would not be sure which.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You don't know the day of the month—of the date?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. You don't know whether he signed the notes on the ninth or the tenth?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. The notes are dated in your hand writing on the ninth are they not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And you don't know whether he signed them before that date or afterwards?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

252 A. He signed them either on the Thursday or the Friday.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. That was either on the ninth or the tenth?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; I suppose the ninth was on Wednesday—on Thursday.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Well now Mr. Johnson if you had filled out these notes before Evans and Brown and the others had signed them and they signed them prior to the ninth, how did you happen to put the date of the ninth in there?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. It was the date of the renewal.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Of a renewal?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir; of the old note.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. But according to your recollection you filled out these notes before there was any signature on them and you put both the date and the time when they were due?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

253      Overruled and Exception.

A. Why of course taking a renewal note we put it on the date that the note becomes due that is a matter of banking business.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now these were renewal notes were they?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Overruled and Exception.

Q. They were renewals of notes which had been made on the twentieth day of November were they not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I don't recollect that date.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. I will try and refresh your memory. You are the gentleman who brought that exhibit here are you not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir; that is the date that Mr. Broyles returned them; it does not say they were made on that date.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. What is that date.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

254      A. 11-20 1907.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Twentieth day of November is it not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Then if these notes were renewals of those notes, how long did those old notes run for?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I don't recollect that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Well now then the notes were not due prior to the ninth were they?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I presume not.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. You have testified that that was your reason for putting the date of the ninth in there was it not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. That was my understanding about it that they were renewal notes and that they came due on that date.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.  
255

Motion denied and exception.

Q. These notes were renewal notes of old notes to the same amount running from November to April, that is what they were, were they?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. That is what I should presume but I would not be positive. I only can give you a presumption because I don't handle that part of the business to any great extent.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. But in this particular instance you did handle this particular business didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. This particular instance I was called in.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. And you handled this particular business?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; up to making out these renewals, Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And then took them down to San Marcial?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. And got signatures on them and took them back to the bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and Exception.

A. I didn't take them down. Well I take that part out because I took them down to San Marcial certainly.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And took them back to the bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. And took them back to the bank, Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Was that for the bank you attended to this entire note business didn't you, this particular business?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Not as regards getting any collateral security upon it or any signatures upon it at all, I didn't have anything to do with that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. You had already gotten the collateral security long prior to April 9th?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I mean signatures; I don't mean collateral—signatures I mean, signatures.

257 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Long prior to April 9th, either the bank thought Mr. Broyles or through you had obtained from Mr. Broyles collateral in the sum of more than twenty-seven thousand dollars, or approximately twenty-seven thousand dollars, hadn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. I don't recollect the amount.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Well you discounted certain collateral and paid for it, that is you credited that amount with the sum of nine thousand nine hundred and ninety-seven dollars didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. And you had and still have sixteen thousand dollars more collateral there in the shape of notes haven't you according to this statement?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. According to that statement, yes, sir.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. And you still have there the bank stock and life insurance policies haven't you or mining stock?

258 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I do not know about the mining stock.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Has the bank sold it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, they haven't sold it as far as I know.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. If it was in there it is yet as far as you know?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. As far as I know.

Motion to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. In whose handwriting is that memorandum to which I called your attention in the margin of the letter of March the 11th from the bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; that is my handwriting; we had that stock; I don't know whether we have got it yet, that is what I am getting at.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Overruled and exception.

Q. That memorandum says—what does it say?

By Mr. DOUGHERTY: We stipulated that they held this and it is one of the parts of the stipulation.

259 By the COURT: This called for at this time simply to make the answer of the witness intelligent to the jury.

Proceed.

Q. What is that memorandum which you say is in your handwriting?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Twenty-five thousand dollars mining stock.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. So you do now remember about the mining—

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I always did remember, didn't deny that I didn't I said I didn't know it was in the bank now.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You know that it was there on the date these notes were signed don't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, I don't recollect that it was there at all. I never saw it after I took it in there.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now you took it in there did you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Certainly did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

260 Motion denied and Exception.

Q. Where did you get it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Mr. Broyles gave it to me.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. When did he give it to you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Don't recollect the date.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Then you also obtained from Mr. Broyles other collateral than these notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; that mining stock I recollect.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And you don't remember the dates?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Was it prior to your visit to Mr. Broyles in February?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

261      Overruled and exception.

A. Don't recollect the time at all.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Little thing like that didn't impress itself on you at all?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. Something I paid very little attention to any more than Mr. Broyles said it was there and I could have it and that is all there was to it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Now as I understand, you didn't take any collateral at all from Mr. Broyles on your visit at the time you inspected his books in February?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I don't think I did. I think our records will show that all the collateral collected, that we have got there now was in—all the collateral—we have got the memoranda—had been in the bank for sometime.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. If you were not at this time in February at Mr. Broyle's bank and at his place of business for the purpose of obtaining additional security why did you examine into his financial affairs?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. For our own satisfaction.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. These twenty-five thousand dollar notes were not due at that time were they?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Not that I recollect.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Just for your own satisfaction you examined into Mr. Broyles' condition financially?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Most assuredly, being large creditors we certainly had a right to know something as far as we could find out.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Was this the first time you had ever examined his financial condition?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Well it was the first time that I had ever, yes sir, I think it was the first time that ever I had gone through the books in any shape or form.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And up to this time?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Up to those two or three books that went through, the bank book and the grocery book.

263 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. What do you mean, what is your answer?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Well just what I said.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. Well will you kindly read that answer. Is that what you mean for an answer?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; those are the only books that I really looked into that is what I want to specify and I never pretended that I went through any other books but those.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. I am asking you to fix the time when you first made an examination of any kind or character of Mr. Broyles' financial affairs if you can do so?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; when I think I was down there in November I asked him a few questions but I never did any more than that; that is my recollection only.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Were you there in November prior to the execution of the notes for which you claimed these were renewal notes?

264 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Don't recollect whether I took them down that time or not.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. These notes that were executed in November were endorsed were they not or secured by other signatures, other signers beside Mr. Broyles?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; that is my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And that was the first time that the bank had ever required any other signatures upon Mr. Broyles' paper wasn't it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I could not say as to that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You had been carrying Mr. Broyles for years for twenty-five thousand dollars on his own notes so you testified?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I testified that there was some fluctuating from five up to twenty-five.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

265 Motion denied and Exception.

Q. On his own notes, the personal notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. And in November you required him to get endorsements didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I won't say that we did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Then how did it happen that you were required as you have stated by your bank to send out and get into San Marcial for the purpose of signing these new notes the signers to these old notes of November?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED AND EXCEPTION.

A. My recollection is that there was signers upon those notes in November but I don't know how far back they went.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

MOTION DENIED AND EXCEPTION.

Q. If the bank had been satisfied for years to carry Mr. Broyles on his own paper and you then had made an examination of his books in February and had found him as you say you honestly believed to be worth eighty-seven thousand dollars over his liabilities and at that time you had twenty-seven thousand dollars in collateral notes in your possession and still had his twenty-five thousand dollar notes and had fifteen thousand dollars of insurance policies and twenty-five thousand dollars of mining stock, why was it that you required him to send out and get practically all the cattle men in that country to sign these notes that you are now suing on?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED AND EXCEPTION.

A. I understood that Mr. Broyles offered to give us further security.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

DENIED AND EXCEPTION.

Q. And he did certain names on the notes, took them or sent them to Albuquerque and you kept them there and you took them back for the purpose of getting other security, why was that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED AND EXCEPTION.

A. For the purpose of getting the renewal notes signed by the parties that signed the first notes.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

MOTION DENIED AND EXCEPTION.

Q. Did you not at that time say to Mr. Broyles that things don't look good and you have got to get some new signers?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Not in my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Why did you get Mr. Lewis, he wasn't one of the old signers why did you get him on these notes after you went back?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

267 A. Mr. Broyles mentioned a number of names.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Then the question I asked you as to going back to get new signers or other signatures to these notes should have been answered in the affirmative, that is you did go there for that purpose?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I went down for the purpose of getting what Mr. Broyles said he could give us.

Move to strike out as incompetent, irrelevant and immaterial and not material under the allegations of the defendant's answer.

Q. Now didn't you positively testify yesterday that you were sent there for the purpose of getting other signers, any other signers you could besides these signers to the old notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I may have testified. I don't recollect.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Well if you did testify you were testifying to the truth were you not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Best of my knowledge and belief. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now did you get a telephone message from the bank while you were in San Marcial concerning the signing of these notes?

268      Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

Q. I may have done. I would not say positively one way or the other; I know I got several telephone messages.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. I will refresh your memory; didn't you get a telephone message from the bank directing you to be sure and get Lewis' signature on these notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

The question does not show from whom or any person to act for plaintiff.

Overruled and Exception.

A. I don't recollect that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and Exception.

Q. Now you stated that on the date of the signing of these notes you regarded Mr. Broyles honestly as worth at least fifty thousand dollars more than his liabilities?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You say that you had quite a talk with George Anderson this witness here about the time or after the signing of these notes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir; principally after.

269      Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Do you know anything about Mr. Anderson at that time obtaining from Mr. Broyles and checking on the Bank of Commerce for three hundred—two hundred favor of Mr. Cook?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Don't recollect it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Do you remember that the bank refused to pay that two hundred dollar check of Mr. Broyles on the Bank of Commerce, the check made on either the ninth or tenth of April?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, I don't recollect.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. In payment of the insurance premium on the life of Mr. Anderson?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Don't recollect anything about it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You don't recollect that about that time the bank turned down other checks of Mr. Broyles?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

#### 270-272 Overruled and Exception.

A. Most assuredly we asked him to secure them.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And up to the time of the making of these notes you had carried him for years without any security?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. No we had certain signatures so far as I can recollect sometime before.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. That is those renewal notes with Evans and Anderson on them?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

A. Yes, sir.

Overruled and exception.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Made in November?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. That is about the time that you began to want security, November?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

273 A. Yes, sir; but that was also about the time that every bank in the country wanted securities.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You wanted security about November and you proceeded to get it in the shape of endorsements on notes and all the collateral that you thought was good that he had in his bank, did you not, that Broyles had in Broyles' bank?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I knew nothing about the value of the collateral that he had.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You didn't?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Simply what he said the total amount of it but I knew none of the men.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You paid nine thousand nine hundred and ninety-seven dollars for some of it didn't you, credited it on his account?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. That is so.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And still you knew nothing about the value of it?

Objected to as incompetent, irrelevant and immaterial  
274 and not in conformity with the pleadings.

Overruled and exception.

A. I knew nothing about the value of what he had in his bank of his of the value of the collateral he had in his bank.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. By particular part of the value of the collateral he had in his bank; I am talking about the collateral that Mr. Broyles had which you took and had in your bank not the collateral which remained in his bank.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; we thought it was good from representations made to us.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. You wanted it didn't you as security for his accounts?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Certainly.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Denied and exception.

Q. And you took it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Certainly.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And you took yourself this twenty-five thousand dollars in mining stock didn't you?

275 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; as an attachment to that note.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Now when you were there and satisfied yourself about Mr. Broyles' financial responsibility in February you ascertained that all this real estate that you give credit for at the rate of forty-five thousand dollars was under mortgage to the State National Bank didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. In February?

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Yes, sir.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You didn't?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Overruled and exception.

Q. You knew that in April when these notes were signed didn't you?

Objected to as incompetent, irrelevant and immaterial and  
276 not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; I believe I did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Then you knew in April when you were getting these notes that Mr. Broyles' financial condition was not as good as it had been didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Didn't?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Mortgage made no difference in your eyes?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. He owed this money to the State National Bank when I made the statement; the question of the mortgage would not change the value.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You are a banker, what do you take a mortgage for?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Protect your account.

277 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Protect your account. Then if one account was protected by a mortgage that reduced your security did it not by that amount?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Certainly.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Now didn't you ask Mr. Broyles at this time why he hadn't given you that mortgage to secure your account?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No recollection of it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Didn't you say that you thought he should have done it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, I don't think I did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Not positive, however, about that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Not at all positive about that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

278 Motion denied and exception.

Q. Now as to these thirty-five thousand dollar notes that you say were in an envelope and you examined two or three of them; you didn't take any of them did you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Not according to my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Now as to this thirteen thousand dollars of accounts merchandise accounts I believe you said you didn't take any of those did you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. What, that was owing on his books?

Q. Yes, sir; you didn't want any assignment of those accounts did you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You were willing to leave that class of security for these twenty-six thousand dollar deposits and other people were you—and other creditors?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. A man would have been a fool if he had wanted to take open accounts on books.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You didn't regard them as any security for your indebtedness did you?

279 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Certainly, certain amount of security certain amount of assets that he had.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. They were in the hands of a collection agency wasn't they?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I believe they were.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You didn't regard him as very good assets did you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; the collection agent said he could get the greater portion of them.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Your experience led you to believe that good accounts have to go through the hands of a collection agency?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I think that a great many accounts can be collected through a collection agency if the collection agent will work on it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

280 Q. In other words if anybody could collect them why a collection agency could collect them?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I believed that those accounts—a great many of those accounts if Mr. Broyles had pushed the collection of them, being largely railroad men that he might have collected quite a considerable portion of them.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Then as to the value of these accounts you didn't rely upon Mr. Broyles' statement but upon your information as to who owed them.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I relied upon those thirteen thousand dollars upon the report of the collection agent and Mr. Broyles combined.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You made a very careful examination of them to discover that they were due from railroad men and all didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; I went over them for possibly fifteen—twenty minutes—half an hour with this collection agent.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And you satisfied yourself that they were good accounts did you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

281 A. Didn't say they were good accounts, said they were possibly collectable accounts.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Now about these two or three notes that you examined among these thirty-five thousand dollar notes; what conclusion did you reach about those?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Didn't reach any conclusion that I know of.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. But your bank didn't want them?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Didn't ask for them.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Didn't ask for them?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Now then in arriving at the credits of Mr. Broyles you give credit for thirty-five thousand dollars of notes which you didn't want?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I didn't say I didn't want them, didn't ask for them.

282 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You didn't ask for them?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Thirteen thousand dollars of accounts in the hands of a collection agency?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Forty-five thousand dollars which before you took these notes was under mortgage?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Now the sum of forty-five, thirteen and thirty-five thousand dollars would amount to ninety-three thousand dollars would it not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I suppose so; you figured it up I haven't.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

283 Motion denied and exception.

Q. And you found that Mr. Broyles was worth eighty-seven thousand dollars over and above his liabilities and you honestly believed in April that he was worth fifty thousand dollars over and above his liabilities based upon this ninety-three thousand dollars of credits among other things?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; didn't I throw thirty-seven thousand dollars off; doesn't those figures show eighty-seven thousand dollars off and this figure show fifty thousand, that leaves a balance due fifty thousand dollars.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Yes, sir; but you testified that you found from these figures at this time in February that he was worth eighty-seven thousand

dollars over and above his liabilities, giving him credit for these amounts which I have mentioned to the extent of ninety-three thousand dollars, that is it is it not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. What I could do when I took these figures and that is all I could get.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Exactly; you mean to say, sir, that having access to his books representing presumably his largest creditor, being there for the purpose of examining his accounts, his financial standing, that you could not have done better than you did do in taking statements from him?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I didn't go down to audit the books as I understand.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.  
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Motion denied and exception.

Q. You took Mr. Broyles' statement for the amount of his credits there except those that you have testified that you yourself took from the books, didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You relied upon that didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Certainly.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Why didn't you rely upon his statements, written statements, in his letters here as to what he was worth?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Well we did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You did?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

285 Q. Then why did you go down there to make any examination?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. What was the date of that letter, February 28th?

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. One of them is February 28th?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Ten days later.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You mean to tell me that you hadn't had a statement from Mr. Broyles prior to that time?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Got statements from him several times but all upon the same form as that vague and indefinite.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And his statements when you examined his books, etc., as to—and which you took at that time, were of the same character as the statements which he had been making to you for months were they not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and Exception.

A. We thought he was perfectly solvent all through.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

286 Q. We are not asking you that. Were not these statements which you took when you made this examination made to you by Mr. Broyles of the same character as the statements which he had been making to you for months as to his accounts?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and Exception.

A. I presumed he was giving us the actual values as far as he knew.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Will the Court direct the witness to answer this question if he cannot to say so.

By the COURT: That is a very simple question. The question is whether these statements contained in these two letters shown you from Mr. Broyles are not of the same character that you had been receiving theretofore. (The Court is mistaken.)

Q. Question repeated. As to his financial condition?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and Exception.

A. Yes, sir; I think they were.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now you say that between February and April when you got these notes that you throw off thirty-seven thousand dollars from what you found Mr. Broyles to be worth in February and you only

honestly believed him to be worth fifty thousand dollars in April over and above his liabilities?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Thought he was always worth fifty thousand dollars and over possibly. I could not say as to a few cents.

Move to strike out as incompetent, irrelevant and immaterial; 287 immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Of course I didn't ask you as to a few cents, you didn't so understand it; you didn't understand as to any few cents, you said you threw off thirty-seven thousand dollars, didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. When I made the statement that Mr. Broyles was worth fifty thousand dollars I certainly did.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Certainly did what?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Throw off thirty-seven thousand dollars. I don't mean to say that his assets has shrunk thirty-seven thousand dollars, but I put it in in a general way.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And you arrived at the amount of his property over and above his debts in April, that is fifty thousand dollars by virtue of those same figures which you have been testifying to?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Certainly.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. In other words thirty-five thousand dollars in old notes which you didn't ask for, thirteen thousand dollars in accounts which were in the hands of a collection agency, forty-five thousand 288 dollars in real estate with a mortgage on it.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir; how much is the mortgage for?

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. I do not now. Are you willing to pay it and take up the property?

Objected to; the gentleman has gone the limit. I don't know whether Mr. Johnson buys mortgages.

Court in recess until two o'clock.

Q. Mr. Johnson in these figures which you claim that you made at the time and to which you testified yesterday and concerning which you have been testifying today I find under the head of resources due open account seventeen thousand five hundred dollars; did you take those figures—were those among the figures that you yourself took from the books?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I think they were. I think there is a cross marked against them. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Then those are the figures that you yourself took from the books?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And in making up your estimate as to Mr. Broyles' resources above his liabilities you credited him with seventeen thousand five hundred open accounts?

289 Objected to, as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now Mr. Johnson you also credited him with thirteen thousand dollars in open accounts which were in the hands of a collection agency?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Do you mean to tell this jury that the open accounts then merchandise accounts as shown by Mr. Broyles' books amount to thirty—thousand five hundred dollars?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Not by his books.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Well how were they shown if not by his books?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. They were a list that was taken off on paper that thirteen thousand.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. They were a list taken from the books of account?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

290 Overruled and Exception.

A. So I understood.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Well don't you know as a matter of fact that that thirteen thousand dollars which was in the hands of the collection agency was a part of and actually embraced in this seventeen thousand five hundred dollars as shown by the books?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Not as I understood it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Did you take all the list of all accounts yourself from the books?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. From the only set of books they were using, Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You didn't examine any other books except that he was using there at that time?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. That is my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. That you only examined the set of books that he was using at this particular time?

291 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Do you mean to say that you don't know as a matter of fact that his book accounts were seventeen thousand five hundred dollars and thirteen thousand dollars of those were in the hands of a collection agency for collection?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Not as I understood it. I will explain that somewhat if you like.

—. I would be glad to have you.

A. They told me they had opened a new set of grocery books and that there were a lot of old accounts in the old books.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You didn't examine those?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir; didn't have access to them at all.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Because you didn't want to wasn't it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Most assuredly because I didn't want to. I suppose if I had asked Mr. Broyles it would have been alright.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.  
292 Motion denied and exception.

Q. You mean to say that without looking at the matter at all for yourself you simply took a list in the hands of a collection agency of the open accounts in their hands and then added it to the open accounts which you yourself had figured up and concluded that he had thirty thousand dollars of open accounts?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. They were listed on this paper as taken from the books so I was informed, and the amount and the interest added and the total of that came somewhere in the neighborhood of thirteen thousand dollars.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Did Mr. Broyles tell you that these thirteen thousand dollars of accounts embraced in this list were in addition to the accounts which you yourself had made up from the books seventeen thousand five hundred dollars?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. So I understood.

Move to Strike out as incompetent, irrelevant and immaterial, immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Did he so tell you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No recollection that he did specially.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Did any one else so tell you?

Objected to as incompetent; irrelevant and immaterial and not in conformity with the pleadings.

293 Overruled and exception.

A. Why I got the general impression. I would not be sure. I don't recollect that point.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Now Mr. Johnson you have testified that you found on his deposit books twenty-six thousand dollars in deposits; do you mean to say that you found no more deposits shown by the deposit books than twenty-six thousand dollars or five per cent more than that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I think not. I think it was ten per cent.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Well you said five before; I will let it go at ten, no more than ten per cent more than that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. That is my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. How many classes of deposits were carried on those deposit books?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. There was only one I think.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. You are a banker are you not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

294 Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. Customary for you to carry on your books only one class of deposits?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; on our individual books only one class.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You make no distinction between time deposits and any other kind of deposits?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Most assuredly we have certificate deposits carried in a separate book entirely.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Does this twenty-six thousand dollars embrace the demand deposits, daily deposits and also the time deposits as shown by Mr. Broyles' books?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Never saw a time deposit book at all.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Then as a matter of fact you only examined his daily deposits?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

295 A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You swear to that do you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Positive of that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And that showed that Mr. Broyles owed depositors in the neighborhood of twenty-six thousand dollars, possibly ten per cent more and no more?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Don't you know as a matter of fact that at that time he owed upon certificates of deposits as shown by his deposits books in his bank in addition to the twenty-six thousand dollars deposits of in the neighborhood of nineteen thousand dollars more?

Objected to as incompetent, irrelevant and immaterial; not in conformity with the pleadings.

Overruled and exception.

296 A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You could have found out if you had wanted to could you not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I asked the question. He said it didn't amount to very much.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Did he give you any idea about what it did amount to?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Not as I recollect.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You wasn't interested in it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Only in a general way.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Just took his word for it that it didn't amount to very much?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Q. Well now if he carried two classes of deposits and you were trying to find out his liabilities why wasn't you just as much interested in finding what his liabilities on time deposits were as any discovery, his liabilities on daily deposits?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. As stated before, I didn't go down there to audit the books.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You have stated before that you examined his books to satisfy yourself as to his financial responsibility haven't you;

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. To get some general idea of it that is all.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And your idea was that although those time deposit books might have shown five thousand dollars liabilities or one hundred thousand dollars liabilities it wasn't of sufficient importance for you to examine into so as to get this general idea of his condition.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I took his word for it as I did in a great many items.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. If you could take his word for one item why could you  
298 not take his word for others?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. That is something that I could not say.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now making up the sum of his total resources then you embrace not only the seventeen thousand five hundred dollars in book

accounts which you found but also thirteen thousand dollars which you found upon a list?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. And so far as your knowledge is concerned or so far as any direct statement to you from Mr. Broyles is concerned the thirteen thousand dollars which you examined might have been embraced in the seventeen thousand and five hundred.

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. No, I don't think it could have been.

Move to strike out as incompetent, irrelevant and immaterial and not material under the allegations of the defendant's answer.

Motion denied and exception.

Q. Why could it not have been?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Because I understood that they were old accounts that were in another book.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.  
299 Motion denied and exception.

Q. Why cannot you answer from what you understood. I have been trying to get at it all the time, from whom did you understand that this thirteen thousand dollars was a different set of accounts from the seventeen thousand five hundred; now who told you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I got it from Mr. Broyles, of course.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Did Mr. Broyles tell you that this thirteen thousand dollars in the hands of the collection agency was a different set of accounts

entirely from the seventeen thousand five hundred of accounts which you made up?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. My recollection, yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You can certainly recollect whether Mr. Broyles told you that or not?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. I have answered the question as far as I can as to my recollection.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Now you found at the same time eight thousand seven hundred and fifty-five dollars of over drafts, is that true?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

300 Overruled and exception.

A. Yes, sir; that is about it.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Within five or ten per cent?

Objected to as incompetent, irrelevant and immaterial and not in conformity to the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Did you take that from the over draft books?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. All in the same book.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. All in the same book. All of his bank books were kept in the same book were they, bank accounts?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and Exception.

A. Open accounts.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Just the open accounts?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and Exception.

A. Just the open account.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.  
301 Motion denied and Exception.

Q. Who were those drafts due from?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

DENIED and Exception.

A. I haven't the slightest idea.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You had at that time hadn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and Exception.

A. Possibly might have had some of them, Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Did you know anything about them at that time?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

OVERRULED and Exception.

A. I might have recollect then; might have had some idea of it then but I don't have any recollection now.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Was there an over draft at that time of the Golden Bell Mining Company which you figured in these eight thousand dollars?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Might have been. I could not say.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You don't know anything about those over-drafts at all?

302 Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, I don't recollect anything without something is brought to my mind.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. And you made no examination into them?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Oh I might have asked a few questions.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Natural that you should have asked a few questions when you are trying to find out whether they were good?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Naturally.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You remember how long they had been over-due any of those over-drafts?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Not the slightest idea.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Made no impression on you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

303 A. No, not specially.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. You in the habit of considering ordinarily—I will ask, were these over-draft accounts protected by any security, say this \$8,755.00?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Could not say.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Didn't examine into that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You just took them as you found them from the books and gave credit for them?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Certainly.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Upon the credit of those eight thousand seven hundred and fifty-five dollars over drafts which you found there, as a banker at that time would you have extended Mr. Broyles five hundred dollars credit?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

304 A. That is a question I cannot answer.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now Mr. Johnson you prepared this list which is attached to this stipulation didn't you?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Over the telephone. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. I say you wrote it out, you prepared it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Is it your hand writing?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Examine this item what is that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. June 1st, J. F. Wells, note and interest \$107.25.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

305 Q. Is that a debit or a credit item?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Credit.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. To Mr. Broyles' account?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. To Mr. Broyles' account.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Wasn't that \$107.25 collected on the notes, a list of which are contained in the letter of the bank of May 18th, which was held in the bank as collateral?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. As to this other item, what is that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Johnson account of Crawford note.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. What is that amount of that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. \$35.00.

306 Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. What is that a credit or a debit item?

Objected to as incompetent, irrelevant and immaterial and not in accordance with the pleadings.

Overruled and exception.

A. Credit.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Wasn't that amount—wasn't that thirty-five dollars collected also on account of collateral in the hands of the bank from Broyles?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir; think it was.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. As to this item here, what is that?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Balance Clayton note, \$11.97.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Was that a credit or a debit item?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Credit.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

307 Q. Is it not a fact that that was also collected on account of this collateral?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. I am not sure whether it was on the collateral or whether it was on the discounted collateral.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You say that was the Clayton note to refresh your memory it was on account of collateral wasn't it?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir; I wasn't quite sure of that.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You are now?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. It was on collateral?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Now this other item \$215. you know anything about?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

308 Overruled and Exception.

A. No, I don't recollect what that was; that was no collateral any way; that was not on collateral any way.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. That 3.03 is also on account of the collateral—Clayton?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Further objection to all this line of testimony as to collateral collected; that it is not in issue in any way; not been placed at issue in the pleadings and that it is not proper cross-examination.

Overruled. Let this testimony go in and at the proper time make the argument on the whole thing.

Exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

By Mr. FALL: For the purposes of these last questions effecting the particular items as shown on the list attached to the stipulation we have made Mr. Johnson our witness and we are bound by his answers.

Plaintiff rests in rebuttal.

By Mr. FALL: Object to the introduction of this stipulation or to the evidence contained in this stipulation as to the seven hundred odd dollars \$722.16 realized upon the Golden Bell note held as collateral as shown in the stipulation; \$772.16 realized upon the collateral accepted by the bank in satisfaction of a judgment obtained by the bank upon the Golden Bell five thousand dollar note held as collateral by the Bank of Commerce as incompetent, irrelevant and immaterial.

By the PLAINTIFF: As the objection to the competency and relevancy of this entire stipulation and all exhibits attached thereto has been expressly reserved we don't make any express reservation in record other than the entire thing is incompetent, irrelevant and immaterial.

309 By the COURT: All the objections overruled for the present.

*Sur-rebuttal.*

CHARLES STORY, a witness called on behalf of the defendants, being first duly sworn according to law, upon his oath testified as follows, to-wit:

Direct examination.

By Mr. FALL:

Q. What is your name?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Charles Story.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Where do you live?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. East of San Marcial.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and exception.

Q. Are you one of the defendants in this case?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and exception.

A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial and not material under the allegations of the defendant's answer.

Motion denied and Exception.

Q. You remember about the time that the notes sued upon in this case were signed at San Marcial?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

310 A. Yes, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Upon that date did you sign those notes if you signed them?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. Seventh.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Seventh of what?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. April.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Where?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. San Marcial.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

Motion denied and Exception.

Q. Did you or not see Mr. Johnson in San Marcial on that day?

Objected to as incompetent, irrelevant and immaterial and not in conformity with the pleadings.

Overruled and Exception.

A. No, sir.

Move to strike out as incompetent, irrelevant and immaterial; immaterial under the allegations of the defendant's answer.

311 Motion denied and Exception.

Defendants rest.

Plaintiff moves after the close of all the evidence in the case for an instruction for the plaintiff because the defense as offered is not sufficient; because the defense is not admissible under the state of the pleadings; does not conform thereto, and the issues which have been raised thereby are not the issues which have been raised by the pleadings; and also for other reasons.

Counsel for defendants move the court to instruct the jury to return a verdict for the defendants in this case for the reason that it appears from the uncontradicted evidence in this case that there are various numbers of the defendants, particularly E. W. Brown, Evans and Anderson signed this note in blank with the understanding of the party obtaining the signatures and the bank itself that the notes were to run from four to six months and that the notes cannot be recovered upon unless they were filled in in accordance with the instructions of the parties signing them; under Section 14 of Chapter 83, Acts of the Legislative Assembly of 1907.

By the COURT: Motion to instruct for the plaintiff against all the defendants is sustained except as against the defendant Lewis. And the motion to instruct for the defendants is denied.

Defendants except.

By the PLAINTIFF: As to the defendant Lewis plaintiff desires to take a non-suit.

By the COURT: It is allowed.

By DEFENDANTS: Exception is noted by defendant Lewis and the other defendants to the ruling of the court granting the non-suit.

By DEFENDANTS: Defendant Lewis and his co-defendants object to the granting of a motion in non-suit and insist that under the ruling of the court sustaining partly the motion made by counsel for the plaintiff in this case and overruling it as to Lewis, that not only Lewis but his co-defendants are entitled to a decision at the

hands of the jury in this case but to an instruction by the court to the jury to return for the defendant Lewis.

Objection overruled.

Exception.

312 The defendants Schmidt and Story, Franz Schmidt, Charles H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt and Henry Lewis again move the Court to instruct the jury to return a verdict for the defendants and particularly for the defendants named in this case because it appears by the motion for non suit as to defendant Lewis that plaintiff elects to discharge the defendant Lewis from obligation upon the paper sued upon, and for the reason that such discharge is a discharge in law against all the other defendants, and that they are entitled to a instruction from the Court to that effect.

Motion for an instruction is denied.

Exception.

The defendants move the Court to instruct the jury that in event under the instructions of the court they find the verdict for the plaintiff in this case they should find credits upon these notes sued upon not only to the amount of the fifteen hundred dollar payments made but also to entire amount of the Golden Bell note which has been sued upon by the plaintiff and judgment obtained and satisfaction acknowledged by the plaintiff in the sum of fifty-nine hundred thirty-eight dollars and forty-seven cents; and also in the sums of thirty-five dollars, one hundred and seven dollars and twenty-five cents, eleven dollars and ninety-seven cents and three dollars and three cents which it is claimed by defendants are shown to have been paid to the plaintiff for the defendants' benefit.

Motion denied.

Exception.

Defendants further move the Court to instruct the jury that the plaintiff had no right to apply the nine thousand and ninety-seven dollars as shown to have been a credit upon certain account of Broyles to such account exclusive of the notes, and that by their verdict they shall give credit to the defendants for all such amount, that is to say, nine thousand nine hundred and ninety-seven dollars or the proportionate amount of such sum which the sum of ten thousand dollars over draft bears to the amount of twenty-five thousand dollars as evidenced by promissory notes in this case.

Motion denied.

Exception.

313 Counsel for the defendants ask the court to instruct the official stenographer to have her record show that the election of plaintiff to take a non-suit as to the defendant Lewis was not made until after the ruling of the Court upon plaintiff's motion for an instruction to the jury.

By the COURT: It will be done.

The defendants move the court to instruct the jury to return a verdict for the defendants in this case for the reason that it appearing that there was collateral held by the bank for these notes and it appearing from the record that the bank knew that the defendants

were simply accommodation makers; that no demand was made upon the defendants for the payment of this note by the plaintiff and that the defendants have had no opportunity to pay the same off and acquire the collateral.

Motion denied.

Exception.

**Copy.**

**PLAINTIFF'S EXHIBIT "A."**

\$5,000.00. ALBUQUERQUE, NEW MEXICO, April 9th, 1908.

*On Demand* after date (without grace) we jointly and severally promise to pay to the order of THE BANK OF COMMERCE, at the office of said Bank, in Albuquerque, New Mexico, *Five Thousand and no hundredths dollars*, with interest at the rate of *ten per cent per annum* from *date* until paid. Principal and interest payable in UNITED STATES GOLD COIN, for value received, and if the same shall not be paid when due, we jointly and severally agree to pay all costs of collection, including reasonable attorneys' fees, if suit be brought on this note, or if attorneys are employed to collect the same.

(Signed)	G. P. ANDERSON.
(Signed)	CHAS. LEWIS.
(Signed)	H. EVANS.
(Signed)	J. N. BROYLES.
(Signed)	FRANZ SCHMIDT & STORY.
(Signed)	CHAS. W. CROSSMAN.
(Signed)	E. W. BROWN.

314 No. 13778 Due, —.

(On the back:) April 16, 1908. Paid \$1,500.

(Words underscored and signatures written in ink. Endorsement on back in pencil.)

**Copy.**

**PLAINTIFF'S EXHIBIT "B."**

\$100,000.00. ALBUQUERQUE, NEW MEXICO, April 9th, 1908.

*On Demand* after date (without grace we jointly and severally promise to pay to the order of THE BANK OF COMMERCE, at the office of said Bank in Albuquerque, New Mexico, *Ten Thousand & no-100 Dollars*, with interest at the rate of *ten per cent per annum* from *date* until paid. Principal and interest payable in UNITED STATES GOLD COIN, for value received, and if the same shall note be paid when due, we jointly and severally agree to pay all

costs of collection, including reasonable attorneys' fees, if suit be brought on this note, or if attorneys are employed to collect same.

(Signed)	G. P. ANDERSON.
(Signed)	CHAS. LEWIS.
(Signed)	H. EVANS.
(Signed)	J. N. BROYLES.
(Signed)	FRANZ SCHMIDT & STORY.
(Signed)	CHAS. W. CROSSMAN.
(Signed)	E. W. BROWN.

No. 13776 Due —.

Words underscored and signatures written in ink.

**DEFENDANTS' EXHIBIT "1."**

No. 5244.

District Court, Socorro County.

**THE BANK OF COMMERCE**  
vs.  
**JASPER N. BROYLES et al.**

It is hereby stipulated and agreed between the parties at the trial of this cause that the following facts shall be taken and admitted as true and that all letters, statements and memoranda hereto attached or made part of this agreement, shall be taken as true statements of the facts therein set forth, but all such facts, letters, statements or memoranda shall be subject to objection by either party as to relevancy or materiality.

315 That on November eighth, 1907, said J. N. Broyles was indebted to Plaintiff in the sum of Twenty-five Thousand Dollars, evidenced by certain promissory notes signed by himself and others; and that the notes involved in this suit, and the note involved in suit of the Bank of Commerce vs. Jasper N. Broyles, et al., No. 5245, on the docket of this Court, renewals of other notes given in renewal of said first mentioned notes. That on said November eighth, 1907, said Broyles was also indebted to Plaintiff on overdraft in the sum of Five Thousand Seven Hundred and Eighty-nine and 48-100 Dollars.

That on said last mentioned date said Broyles deposited with Plaintiff, as collateral, certain notes of third parties, payable to said Broyles and endorsed by him to said Bank, among which was a note of The Golden Bell Mining Co., dated September thirtieth, 1907, for the sum of Five Thousand Dollars, payable six months after date, with 12 per cent interest. That thereafter the amount of the overdraft of said Broyles on said Plaintiff Bank was increased from time to time until March 10th, 1908, when it amounted to \$10,316.79. That on March 11th, Plaintiff credited upon said draft certain of

the notes that had been theretofore deposited with it as collateral a list of said notes being contained in letter of said Plaintiff to said Broyles of that date, which is made part of this stipulation; leaving the balance of said Broyles on that date \$319.65; that thereafter the condition of said Broyles' open account with said Bank is shown by daily statement, made a part of this stipulation, until June 1st, 1908, when said Broyles ceased to do business with said Bank and that on said day the amount of his overdraft was \$472.48.

That on April 28th, 1908, Plaintiff commenced suit against The New Golden Bell Mining Company on the note first above mentioned and on May 27th, 1908, recovered judgment on said note for the principal and interest thereof amounting to \$5,938.47, with costs of suit. That on June — 1908, The New Golden Bell Mining Company delivered to Plaintiff certain security for and on account of said judgment, upon which Plaintiff has up to this date realized \$772.16. That upon the receipt of said security said judgment was marked satisfied of record by directions of Plaintiff.

316 That each party shall have the right to offer additional evidence as to the matters herein stipulated to be true and as to any and all collateral, securities of whatever kind deposited by said Broyles with said Bank, and the purpose for which such collateral was deposited and as to how the same was disposed of, subject to objections on the other side.

(Signed)	H. M. DOUGHERTY,
(Signed)	JAMES G. FITCH, <i>Att'ys for Plff.</i>
(Signed)	ALBERT B. FALL,
(Signed)	HOLT & SUTHERLAND, <i>Att'ys for Dfts, Except J. N. Broyles.</i>

Socorro, N. M., June 30, 1908.

Copy.

J. N. Broyles, Banker.

SAN MARCIAL, NEW MEXICO, 11-20, 1907.

Bank of Commerce, Albuquerque, New Mex.

DEAR SIR: I enclose for collection and — items as stated below.  
Respectfully yours,

J. N. BROYLES, *Cashier.*

Protest.

Note .....	\$5000.00
" .....	10000.00
" .....	10000.00
	25,000.00

Mr. H. Evans is worth probably 25 to \$40,000.00.

E. W. Brown worth about 25000.00 net.

Can get more if you wish them. Haven't seen Andy Brown & Evans in Town since I came back.

J. N. B.

317

Copy.

M'ch 10, Bal. ....	\$10,316.79	Bal. ....	\$472.48
M'ch 12, Ck. ....	128.00	M'ch 11, Disbs. ....	\$9,997.14
M'ch 13, Ck. ....	175.00	M'ch 13, 8-11 ....	130.92
M'ch 14, Ck. ....	284.41	8-12 ....	175.00
M'ch 17, Ck. ....	65.00	M'ch 14, 8-13 ....	285.00
R. ....	8.75	M'ch 16, 8-14 ....	65.00
M'ch 19, Ck. Fees. ....	144.86	M'ch 17, 8-16 ....	12.00
M'ch 23, Ck. ....	6,000.00	M'ch 18, 8-17 ....	406.47
M'ch 24, Reld. ....	1,200.00		929.47
M'ch 26, Ck. ....	2.50		482.14
R. ....	16.09		444.01
Cy. ....	500.00	M'ch 19, Gold ....	1,000.00
M'ch 27, Ck. ....	12.00	8-18 ....	363.81
M'ch 28, Ck. ....	11.50		407.27
M'ch 30, Ck. ....	30.00		124.47
Ck. ....	100.00	M'ch 20, 8-19 ....	190.00
Ck. ....	50.00		180.91
Ck. ....	7.00	M'ch 21, 8-20 ....	260.69
M'ch 30, Int. ....	28.78		1,290.90
Ap'l 10, Ck. Reld. ....	29.50	M'ch 23, 8-21 ....	1,024.00
Ap'l 17, Ck. ....	1,500.00	Frank Johnson....	215.00
May 21, Ck. ....	1,000.00	M'ch 24, Bal. Clayton note.....	11.97
		Pt. Clayton note....	3.03
		8-20 ....	53.70
		8-26 ....	550.00
		M'ch 28, 8-27 ....	100.00
		Ap'l 9, 8- 7 ....	9.10
		Ap'l 16, 8-15 ....	131.21
			578.52
			1,573.72
		Ap'l 30, Johnson acct. Crawford note .....	35.00
		June 1, J. F. Wells note int. ....	107.25
		Bal. on Dft. ....	472.48
			\$21,610.18

318

*Daily Statement J. N. Broyles' Acct.*

Capital and Surplus \$225,000.

The Bank of Commerce.

S. Luna, President.

W. S. Strickler, Vice-Pres't and Cashier.

W. J. Johnson, Ass't Cashier.

ALBUQUERQUE, NEW MEXICO, May 18, 1908.

J. N. Broyles, San Marcial, New Mexico.

DEAR SIR: We have your telegram of this date in which you request us to mail you today sure list of collateral notes with names, dates and amounts, and in accordance with above, we attach such list below:

J. W. Crawford,—5-22-06—\$700.00	Put up as Collatertl.
Less endorsed \$100.	
and Jones' note \$350. ....	\$250
Jones has since paid \$35.00 on his note	W. Jones
L. M. Lasley, Aug. 1, 1906, two of \$2000. each and balance on another..	Nov. 8 '07 589.02 Feb'y 2 1906

Deed of Trust attached .

E. W. Brown, Aug. 31, 1907.....	440.00 Nov. 8 '07
J. F. Wells, Oct. 15, 1907.....	100.00 Dec. 17 "
W. B. McCrary, Sep. 26t, 1907.....	800.00 " " "
New Golden Bell Mining Co., Sep. 30, 1907. ....	5000 Nov. 8 '07
S. L. Clayton, Sep. 20, 1907, Bale.....	146.97 " " "
H. Evans, reneval Feb'y 15, 1908. ....	\$593.94 Original Dec. 25 "
H. Evans, renewal Feb'y 15, 1908. ....	1903.66 Renewal M'ch 11 "
G. E. Sanchez, { 9-27-07 .....	} 400.00 Nov. 8 '07
W. G. Lane, { 9-27-07 .....	} 400.00 Nov. 8 '07
G. E. Sanchez, \$100 on which you have reported \$50.00 paid but did not remit covering.	
319 G. H. Featherson, 7-27-07.....	635.30

This letter we overlooked advising you of in sending you the last list of notes as same were in collection account and was overlooked.

Very truly yours,  
(Signed)

W. S. STRICKLER,  
V.-P. & Cash.

G. E. Sanchez .....	1595829 5000
	<hr/>
	1600829

*Deposited in the Bank of Commerce of Albuquerque, New Mexico,  
by J. N. Broyles, Nov. 8th, 1907.*

Please List Each Check Separately.

Bank Notes.	Dollars. Cents.
Gold.	
Silver.	

Checks.

Notes as Collateral.

New Golden Bell Mining Co.	5,000.00
W. G. Lane	1,356.00
W. M. Fite	800.00
C. B. Bruton	1,500.00
H. Evans	1,000.00
Henry Russell	535.00
G. P. Anderson	500.00
G. E. Sanchez	400.00
E. W. Brown	440.00
D. M. Farson	100.00
W. W. Jones	350.00
S. L. Clayton	50.00

W. S. STR.

Over.

On the back

320	12-17-07.	
	C. A. Tinguely	1,500.00
	M. R. McCrary	800.00
	J. F. Wells	100.00
	F. H. Richards	327.00
12-25.	H. Evans, 7-5-1907, 6 mo.	1,803.66
"	H. Evans, Apr'l 10, 1907	593.94
"	W. W. Edwards Lane, 7-27-1907	437.09
"	C. B. Bruton, May 5, 1907	1,060.00
	K. F. Johnson, Oct. 24, 1907	1,600.00

Copy.

*Deposited in the Bank of Commerce of Albuquerque, New Mexico,  
by J. N. Broyles, Feb'y 2, 1906.*

Please List Each Check Separately.

Bank notes.	Dollars.	Cents.
-------------	----------	--------

Gold.  
Silver

Checks.

Collateral notes.

L. M. Lasley .....	6- 1	\$472.00
Chas. M. Crossman .....	6- 1	3,000.00
H. Evans .....	6- 1	1,500.00
F. H. & H. M. Richardson .....	8-25	1,000.00
H. W. Crawford .....	12- 1	540.00

W. W. Edwards}

&

W. G. Lane,

C. A. Tinguely,

Crespin Aragon}

Carpio Chavez {

J. R. McVay }

F. H. Richards{

J. N. Wilden)

F. W. Saxton{

C. H. Featherston .....

7- 1	300.00
4-29	500.00
4-12	150.00
3-21	200.00
7-20	100.00

635.30

321

Copy.

Capital \$150,000.00.

The Bank of Commerce.

Solomon Luna, President.

W. S. Strickler, Vice-Pres't and Cashier.

W. J. Johnson, Ass't Cashier.

ALBUQUERQUE, NEW MEXICO, Feb'y 17, 1906.

J. N. Broyles, San Marcial, N. M.

DEAR SIR: I do not find note of R. E. Tracy for \$50.00; all those small notes you took back with you. I will enclose with this a memorandum of the notes aside from those that we discounted which you left. I note letter which you received and forwarded me from Mr. Featherston. I wrote him a short time since that we desired

him to arrange to take this paper up. It might be well for you to also drop him a line to the effect that we have insisted that the matter be arranged and that it would be necessary for him to take the matter up with his brother without delay.

Very truly yours,  
(Signed).

W. S. STRICKLER,  
*V. P. & Cash.*

Copy.

Capital \$150,000.00.

The Bank of Commerce.

Solomon Luna, President.  
W. S. Strickler, Vice-Pres't and Cashier.  
W. J. Johnson, Ass't Cashier.

ALBUQUERQUE, NEW MEXICO, *March 11, 1908.*

J. N. Broyles, San Marcial, N. M.

DEAR SIR: We herewith return duly cancelled the following notes for which you have sent us renewals:

H. Evans .....	\$593.94, renewal dated Feb. 15, '08
do .....	1,803.66 renewal dated Feb. 5, '08
W. H. Edwards & W. C. Lane .....	437.19 renewal dated Jan. 25, '08
G. P. Anderson .....	500.00 renewal dated Feb. 6, '08
H. Evans & J. P. Wells.....	1,000.00 renewal dated Jan. 27, '08

We herewith return your note of \$1,000.00 of the 7th  
322 which we are unable to handle as per our telephone to you  
yesterday.

Very truly yours,  
(Signed)

W. S. STRICKLER,  
*V. P. & Cash.*

Copy.

Capital \$150,000.00.

The Bank of Commerce.

Solomon Luna, President.  
W. S. Strickler, Vice-Pres't and Cashier.  
W. J. Johnson, Ass't Cashier.

ALBUQUERQUE, NEW MEXICO, *March 11, 1908.*  
J. N. Broyles, San Marcial, N. M.

DEAR SIR: In order that you can revise your list of notes which  
we have been holding as collateral for and on account of any in-

debtedness or endorsements of yours, we will give you below a list and would thank you to check it over:

W. W. Jones .....	\$350.00
G. E. Sanchez, W. G. Lane .....	400.00
J. W. Crawford .....	700.00
Less \$100.00 paid you and Jones' note \$350.00 .....	250.00
Note L. M. Lasley, Aug. 1, '06 .....	2,000.00
Do. ....	2,000.00
Do. ....	2,000.00
E. W. Brown, Aug. 31, '07 .....	440.00
J. F. Wells, Oct. 15, '07 .....	100.00
W. R. McCrary, Sept. 26, '07 .....	800.00
New Golden Bell Mining Co., Sept. 30, '07 .....	5,000.00
S. L. Clayton, Sept. 20, '07; bale .....	10.00
Do. ....	50.00
Do. ....	50.00
Do. ....	50.00
H. Evans, renewal Feb. 15, '08 .....	593.94
Do. Feb. 15, '08 .....	1,803.66

2 Fite Notes. Ret'd to J. N. Broyles, 3-2-28-08, W. J. J. Asst. Cash.

323 Will you please advise us the amount that Fites now owes you and unless he is able to pay this we would suggest that you get a new note payable On Demand for the balance due you so that we can settle up these old notes. Mr. Johnson left with you note of Sanchez and Lane for \$400.00 for which they were to give a renewal and have some other members there connected with your Commercial Club also sign.

You have not as yet sent this to us and we would request that you have this fixed up and forward to us at once.

Very truly yours,  
(Signed)

W. S. STRICKLER,  
*V. P. & Cash.*

Copy.

. Capital \$150,000.00.

The Bank of Commerce.

Solomon Luna, President.

W. S. Strickler, Vice-Pres't and Cashier.

W. J. Johnson, Ass't Cashier.

ALBUQUERQUE, NEW MEXICO, March 11, 1908.

J. N. Broyles, San Marcial, N. M.

DEAR SIR: We today credit your account \$9,997.14, covering the following notes:

A. E. Rouiller .....	\$2,819.25
Kelden Johnson .....	1,600.00
D. M. Farson .....	100.00
F. H. Richards .....	327.00
Chas. M. Crossman .....	1,857.80
W. H. Edwards & W. G. Lane.....	437.09
G. P. Anderson .....	500.00
H. Evans & J. F. Wells.....	1,000.00
W. G. Lane .....	1,356.00
	<hr/>
	\$9,997.14

The above notes have of course been in our hands many months, or have been substituted in place of other notes which we have been holding as collateral for your account and as they have been but recently renewed, you of course have collected the interest up to date or renewal on the old notes. In view of the fact that we must carry the Rouiller note at eight percent, we have figured the matter over roughly and find that the interest accrued on the above notes would be practically an offset to what we will be out on the Rouiller note, so I presume it will be satisfactory to you to simply let it be a stand off.

Very truly yours,  
(Signed)

W. S. STRICKLER,  
*V. P. & Cash.*

Copy.

Capital \$150,000.00.

The Bank of Commerce.

Solomon Luna, President.  
W. S. Strickler, Vice-Pres't and Cashier.  
W. J. Johnson, Ass't Cashier.

ALBUQUERQUE, NEW MEXICO, March 11, 1908.

J. N. Broyles, San Marcial, N. M.

DEAR SIR: We have taken note from A. E. Rouiller for \$2,819.25, dated Feby. 20th, 1908, and payable on or before June 1st, 1909, with 8 per cent interest covering note of:

Bruton dated Apr. 3rd, 1907 .....	\$1,500.00
And interest to Feby. 20th .....	158.50
Bruton note of May 5th, 1907 .....	1,060.00
Interest to Feby. 20th .....	100.75
	<hr/>
	\$2,819.25

We will enclose with this a guarantee which you can sign and return which we will attach to the note in order that we can pass

the same to your credit. Mr. Rouiller finally agreed to assume these notes if we would make the interest 8 per cent; we thought it best to accept this rather than to take any further chances and let it go over.

Very truly yours,  
(Signed)

W. S. STRICKLER,  
*V. P. & Cash.*

325                  *Copy of Defendant's Exhibit "2."*

Postal Telegraph-Cable Company.

Office of Manager.

SAN MARCIAL, N. M., 10-28TH, 1907.

Bank of Commerce, Albuquerque, New Mex.

DEAR SIR: I wish to say that I want to do all my Banking business with you again I to send all my remittance to you daily and draw on you to pay 1st Nat'l and State Banks as they mail me checks on my ac.

Mr. Schmidt will send me a good check from Magdalena, N. M. as soon as they get cars to load the sheep also I have a \$400,000 check coming in from Chicago in few days Expect about \$10,000 in next 1 to 5 days in all & may be more Have on hand several dollars Good Notes can't you take them & give me 4 or \$5,000.00 for a few days to help me over until this remittance comes in I am looking for I would come up to see you but I have so much to do & look after that it looks almost impossible to leave here Want you to be sure to help me out for a few days only until I get these collections in Mr. C. H. Lewis will be in tomorrow or next day & I think sure he will pay you his note I have requested him to do so at once.

I will cut off all loans here & send a man out to collect on bills & loans at once & get this load off my back.

Doing a fine business big stock on hand old store full also new one My last invoice over One Hundred Thousand Dollars net worth. Pls. answer me Return Mail & be sure to give me help a few days to Bridge me over & ob'ge

Y'rs,  
(Signed)

J. N. BROYLES.

May come up to see you in 2 or 3 days Can send you a 5,000.00 Life Ins. P'lcy & several hundred dollars in Good Notes etc.

326

Copy.

42670.

## DEFENDANT'S EXHIBIT "3."

J. N. Broyles,  
 Baker, Wholesale and Retail Grocer, Dry Goods, Hardware, Furniture, Proprietor Roller Flour Mills.

Office, Postal Telegraph Cable Co.

SAN MARCIAL, NEW MEXICO, 22-28, 1908.

W. S. Strickler, Bank of Commerce, Albuquerque, New Mexico.

DEAR SIR: Please note Jany. I had \$2,000.00 cash from you & returned you over \$20,800.00 fell behind about 1,000.00 In Feb'y had 1,000.00 cash returned you since receiving this cash near 950.00 making me short 50.00 on this shipm't also sent you last few days near \$4,000.00 in good notes your request & have 500.00 more to send as soon as I see party to sign them. Now Sir I am having the hardest time of my life to keep above the water want you to discount all the notes you hold as collateral Bal. up my over drafts acct. & Cr. Bal. on my 25,000.00 notes & return to me paid wish you would place one or \$2,000.00 to my Cr. from the note acct. I sure need it for a short time.

About all depositors are paid but my time certificates are coming in daily paid out to day near \$1,000.00 & will have them all paid soon then I will clean my Back Acct. up with you.

The acct. I owe the State Nat'l they say will renew the note so they will not bother me.

I need one or 2 thousand Cr. Bal. to clean up my small Mdse. bills due and most due In 30 or 60 days will be in better shape cattle sales will come in also wool etc.

Be sure to do this tomorrow so to start out M'ch 1st in better shape 20,000.00 will pay every cent I owe.

Have that due me from Mdse. Book Accts. that are good as gold.

Ytl,  
 (Signed)

J. N. BROYLES.

327 TERRITORY OF NEW MEXICO,  
*County of Luna, ss:*

I, Minnie McGlinchey, official stenographer and court reporter of the Third Judicial District of the Territory of New Mexico, and for the District Court of Socorro County, in said District, do hereby certify that the above and foregoing is a full, true and correct transcript of all the evidence introduced or offered, by either party, on the trial of Civil Action No. 5244. The Bank of Commerce, plaintiff, vs. Jasper N. Broyles, et al., defendants, in said Court, and of all objections, motions, applications, and offers made by either

party thereto, the rulings of the Court thereon, and the exceptions saved by either party; and I do further certify that such transcript contains all of the evidence of each witness who was sworn and testified on said trial, and contains all proceedings had on said trial.

Witness my hand at Deming, Luna County, New Mexico, this 3rd day of September, 1908.

MINNIE McGLINCHEY,  
*Official Stenographer and Reporter,*  
*3rd Judicial District Court, New Mexico.*

Filed in my office this 28th day of September, A. D. 1908.

WILLIAM E. MARTIN, *Clerk.*

And be it further remembered: That during the trial of said cause, and after demand by counsel for defendants upon counsel for plaintiff for the production of a letter written by Mrs. Broyles to W. S. Strickler, Cashier of plaintiff bank, which demand is shown upon page eighty of the stenographer's transcript herein, said letter was produced by plaintiff's counsel in compliance with said demand, and submitted to counsel for defendants, who thereupon and after inspection thereof elected not to use said letter.

TERRITORY OF NEW MEXICO,  
*County of Socorro, ss:*

I, Frank W. Parker, do hereby certify that I am the judge before whom the above entitled cause was tried; that the recitals upon this page hereinabove appearing are in accordance with the facts, to which I accordingly certify in order that the same may be incorporated within and become a part of the bill of exceptions in this cause.

Witness my hand at Las Cruces, N. M., this 22nd day of October, A. D. 1908.

FRANK W. PARKER,  
*Associate Justice of the Supreme Court of  
the Territory of New Mexico and Presid-  
ing Judge of the Third Judicial District  
Courts Thereof.*

Filed in my office this 22nd day of October, A. D. 1908.

WILLIAM E. MARTIN, *Clerk.*

In the District Court of the Third Judicial District of the Territory  
of New Mexico Within and for the County of Socorro.

No. 5244.

THE BANK OF COMMERCE, Plaintiff,

vs.

JASPER N. BROYLES, SCHMIDT & STORY, FRANZ SCHMIDT, CHARLES  
H. Story, Charles M. Crossman, Edward W. Brown, William E.  
Pratt, Charles Lewis, and Henry Evans, Defendants.

And now, on this 22nd day of October, A. D. 1908, at five o'clock p. m., defendants, Schmidt & Story, Franz Schmidt Charles H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt, and Henry Evans, by Holt & Sutherland and J. F. Bonham, their attorneys, appeared before me, the Judge of the District Court aforesaid, at my chambers in the Court House of Dona Ana County, Territory of New Mexico, and submitted to be settled, signed and sealed by me the bill of exceptions in the above entitled cause; and it appearing from the foregoing stipulation that attorneys for plaintiff have agreed with attorneys for said defendants that after said attorneys for plaintiff have had an opportunity to examine said bill of exceptions, in case they find same to be complete and correct in every respect they will signify to the Judge of this Court their consent that said bill of exceptions may be settled and 329 signed upon request of attorneys for defendants without said attorneys for plaintiff being present; and the attorneys for plaintiff having signified such consent:

Now, therefore, I, Frank W. Parker, do hereby certify that I am the Judge before whom the above entitled cause was tried; that Miss Minnie McGlinchey was the official stenographer who reported said cause; that the annexed and foregoing shorthand report of testimony and evidence duly certified by said official stenographer is the report of testimony and evidence in said cause, and contains, with the records, exhibits, and documentary evidence therein referred to and identified, all of the testimony offered, given, or introduced in said cause by the respective parties, upon the trial thereof; all objections and motions of the said parties thereto or any part thereof; all rulings of the court upon such objections and motions; and all exceptions to such rulings:

And inasmuch as the matters and things stated in the foregoing bill of exceptions are not of record in said cause, in accordance with the prayer of attorneys for above named defendants that said bill of exceptions may be settled, signed and sealed and made a part of the record in said cause, I hereby further certify that the foregoing record and bill of exceptions have been by me settled, signed and sealed, and that the same constitute the record on appeal in said action to the Supreme Court of the Territory of New Mexico from the decision and judgment of the District Court aforesaid in said action, and to the end that the matters and things contained

in said exceptions may become a part of the record in this cause I sign the same the day and year hereinabove first written.

FRANK W. PARKER,

*Associate Justice of the Supreme Court of  
the Territory of New Mexico and Presid-  
ing Judge of the Third Judicial District  
Courts Thereof.*

Filed in my office this 22nd day of October, A. D. 1908.

WILLIAM E. MARTIN, Clerk.

330 TERRITORY OF NEW MEXICO,

*Third Judicial District, County of Socorro, ss:*

I, William E. Martin, Clerk of the District Court of the Third Judicial District, in and for the County of Socorro, do hereby certify that the foregoing is a full, true and complete copy and transcript of all the pleadings and proceedings in a case lately pending in the said District Court, in which the Bank of Commerce was plaintiff, and Jasper N. Broyles, Schmidt & Story, Franz Schmidt, Charles H. Story, Charles M. Crossman, Edward W. Brown, William R. Pratt, Charles Lewis and Henry Evans were defendants, as the same remains of record in my office.

Witness my hand and the seal of said Court, this 22nd day of October, A. D. 1908.

[Seal of District Clerk of Third Judicial District Court.]

WILLIAM E. MARTIN, Clerk.  
WM. D. NEWCOMB, Deputy.

331 And afterwards, on towit, *on* the twenty-fourth day of October, A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of errors was and is in the following words and figures to-wit

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1909.

No. 1248.

THE BANK OF COMMERCE, Appellee,  
vs.

SCHMIDT & STORY, FRANZ SCHMIDT, CHARLES H. STORY, CHARLES M. CROSSMAN, EDWARD W. BROWN, WILLIAM E. PRATT, and HENRY EVANS, Appellants.

332 *Assignment of Errors.*

And now come the above-named appellants and say that there is manifest error in the record, proceedings, and judgment in this cause, and against the just rights of these appellants in this, to-wit:

1. That the complaint does not state facts sufficient to constitute a cause of action.
  2. That all the material allegations of the complaint are conclusions of law.
  3. That the complaint fails to allege non-payment.
  4. That the court erred in overruling plaintiff's motion for a new trial herein.
  5. That the court erred in assuming that there was no evidence for the jury to consider as to appellants.
  6. That the court erred in passing upon and finding the facts at issue in the case.
  7. That the court erred in directing the jury to find a verdict for the plaintiff against appellants.
  8. That the court erred in not submitting to the jury disputed questions of fact under the issues in the case as to which there was conflicting and contradictory evidence.
  9. That the court erred in usurping the functions of the jury by passing upon disputed questions of fact.
  10. That the court erred in deciding itself as to the questions of non-payment and as to amount of payments on notes, and in not submitting the same to the jury for consideration.
  11. That the court erred in deciding and determining that the plaintiff had sustained all the issues on its part by competent evidence and proof.
- 333      12. That the court erred in taking away from the jury the question of fact in regard to the reasonableness of the time of the demand in this case under the particular circumstances in evidence.
13. That the court erred in taking away from the jury the consideration of questions of fact in regard to whether or not the notes as to the time of payment were in blank at the time of signatures, and as to whether or not the time agreed upon at the time of signatures was four or six months.
  14. That the court erred in taking away from the consideration of the jury the question of fact as to whether or not at the time of the signatures of the notes the time of payment was left in blank and same afterwards filled in by the plaintiff so as to read payable "on demand after date," contrary to the understanding and agreement of all the appellants and makers of said notes.
  15. That the court erred in deciding that there were no disputed questions of fact to be submitted to the jury.
  16. That the court erred in overruling appellants' motion to instruct the jury to return a verdict for defendants upon the ground that several of the defendants signed the notes sued on with the understanding from plaintiff that said notes were to run from four to six months, and the further ground that said notes were afterwards filled in by plaintiff so as to read payable on demand after date.
  17. That the court erred in permitting plaintiff to take a nonsuit as to defendant, Charles Lewis, after the court had ruled that as to defendant Lewis the case must go to the jury.

334 18. That the court erred in refusing to permit said case to go to the jury as to said defendant Lewis and in denying said defendant the right to a verdict at the hands of the jury.

19. That the court erred in refusing to instruct the jury to return a verdict for all defendants after permitting plaintiff to take a nonsuit as to defendant Lewis.

20. That the court erred in refusing defendants' motion to instruct the jury that in the rendition of their verdict under instructions of the court they should credit defendants upon the notes sued upon not only as to the \$1,500 payment admitted by plaintiff, but also as to the entire amount of the note of the New Golden Bell Mining Company shown by the record to have been held by plaintiff as collateral to secure the payment of the notes sued upon, and upon which the record also showed plaintiff had obtained judgment for \$5,938.47, and of which judgment the record further showed plaintiff to have subsequently acknowledged satisfaction; that the court likewise erred in refusing to instruct the jury to further give defendants credit for the sums of \$35.00, \$107.25, \$11.97, and \$3.03, also shown by the record to have been paid to the plaintiff upon collateral likewise held by plaintiff to secure the payment of the notes sued upon.

21. That the court erred in refusing defendants' motion to instruct the jury that plaintiff had no right to apply the \$9,997 shown by the evidence to have been credited by plaintiff upon a certain account of the defendant Broyles, to such account exclusive of the notes sued upon, and to further instruct the jury that they

335 should give credit to the defendants for all such amounts; that is to say, for said sum of \$9,997, or such proportionate amount thereof as the \$10,000 overdraft shown by the evidence bore to the total sum of \$25,000 evidenced by promissory notes of defendants held by plaintiff.

22. That the court erred in denying defendants' motion to instruct the jury to return a verdict for defendants upon the ground that it appeared from the evidence and record in the case that there was collateral held by the plaintiff for the notes sued upon, and that plaintiff knew defendants to be simply accommodation makers.

23. That the court erred in denying defendants' motion to instruct the jury to return a verdict for defendants upon the grounds that no demand was proven, that the record disclosed no demand made by plaintiff upon defendants for the payment of the notes sued on, and that no opportunity was afforded defendants to pay off the notes sued on and acquire the collateral shown by the record to have been deposited with plaintiff to secure payment of same.

24. That the court erred in holding that there was insufficient evidence upon which defendants could go to the jury with reference to the understanding between plaintiff and the makers of the notes sued upon as to the time when same were to be made payable, and in holding and instructing the jury that such defense had not been made out or established by the testimony, and in holding and instructing the jury that plaintiff had a right to fill out the notes sued upon so as to make same read payable on demand.

25. That the court erred in holding that there was insufficient evidence upon which defendants, with the exception of Lewis,  
336 could go to the jury upon the question of alleged false and fraudulent representations by plaintiff whereby defendants and appellants were induced to sign the notes sued on.

26. That the court erred in overruling defendants' contention that false and fraudulent representations made to one of the joint makers of the notes sued upon were sufficient in law to vitiate said notes and to discharge all makers from liability.

27. That the court erred during the progress of the trial in sustaining objections by plaintiff over exceptions by defendants and excluding testimony material and competent under the issues in the cause.

28. That the court likewise erred in excluding portions of testimony offered by defendants as to conversations between defendants and plaintiff's authorized agent, the assistant cashier of plaintiff bank, which were evidently a part of the res gestae of the transaction incident to the signing of the notes sued upon.

29. That the court likewise erred in excluding testimony offered by defendants as to the statements made by plaintiff through its said authorized agent regarding the length of time said notes were to be carried.

30. That the court likewise erred in excluding testimony offered by defendants in support of allegations contained in their answer and limiting their proof to allegations of false and fraudulent representations regarding the solvency of defendant Broyles, and as to the notes sued upon being amply secured by collateral, and in excluding all testimony offered by defendants with reference to the agency of defendant Broyles, and as to representations made  
337 by said Broyles to appellants while acting in the alleged capacity of agent for plaintiff.

31. That the court likewise erred in excluding testimony as to statements made by defendant Broyles in the presence and hearing of Johnson, assistant cashier of plaintiff bank, (1) because Broyles was acting as agent for plaintiff, (2) because statements sought to be proven were made in the presence of plaintiff's said assistant cashier, and (3) because such statements were a part of the res gestae of the transaction.

32. That the court likewise erred in withdrawing from the consideration of the jury testimony by defendant, Broyles, as to his financial condition at the time the notes sued upon were signed, and testimony as to what caused said defendant to close his bank, and also as to what occurred and as to conversations had between said defendant and attorneys, Fitch and Dougherty, the subject matter of said conversations having been gone into and drawn out by plaintiff upon cross examination.

33. That the court erred in excluding testimony offered by defendants through defendant Broyles concerning statements made by him in the presence and hearing of Johnson, assistant cashier of plaintiff bank, as to how long the notes sued on were to run and in denying defendants' offer to prove that appellant, Crossman, was induced to

sign the notes sued on by virtue of alleged false and fraudulent representations made to him by defendant Broyles while acting in the capacity of agent for plaintiff bank.

34. That false and fraudulent representations made to defendant Lewis by virtue of which he was induced to sign the notes 338 sued upon were sufficient in law to vitiate said notes and discharge all other makers from liability; and the fact that some of the makers of said notes had previously signed another note, or other notes, was no bar in the interposition by them of such defense; and upon the issue of false representations appellants as well as defendant Lewis were entitled to go to the jury.

35. That plaintiff by stipulation having acknowledged satisfaction of judgment against the New Golden Bell Mining Company, which judgment was based upon a note theretofore deposited by defendant Broyles as collateral to secure payment of the several other smaller amounts of money hereinbefore mentioned and shown by said stipulation to have been collected upon other collateral deposited for the purpose aforesaid, defendants were entitled in the rendition of the verdict herein to be given credit for the aggregate of said several amounts.

Wherefore, appellants pray that the judgment of said District Court may be reversed and this cause remanded and a new trial granted to appellants.

HOLT & SUTHERLAND,  
J. F. BONHAM,  
*Las Cruces, New Mexico, Attorneys for Appellants.*

339 And Afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the First Montay in January A. D., 1909, on the Seventh day thereof, the same being Thursday, January 14th, A. D., 1909, the following among other proceedings were had and entered of record, towit:

No. 1248.

THE BANK OF COMMERCE, Appellee,  
vs.  
JASPER N. BROYLES et al., Appellants.

Appeal from District Court, Socorro County.

This cause coming on for hearing upon the transcript of record, assignment of errors and briefs of counsel, is argued by F. E. Wood, Esq., for appellants, and H. M. Dougherty, Esq. for Appellee, and submitted to the court, and the court not being sufficiently advised in the premises takes the same under advisement.

And Afterwards, on towit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday

in January, A. D., 1910, on the Third day thereof, the same being Monday, February 28th, A. D. 1910, the following among other proceedings were had and entered of record, towit:

No. 1248.

THE BANK OF COMMERCE, Appellee,  
vs.  
JASPER N. BROYLES et al., Appellants.

Appeal from District Court, Socorro County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised 340 in the premises announces its decision by Associate Justice Pope, Chief Justice Mills, and Associate Justices McFie, and Abbott concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file; It is therefore considered and adjudged by the court that the judgment of the District Court in and for the county of Socorro, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith, it is considered and adjudged by the court that the plaintiff, The Bank of Commerce do have and recover of and from the defendants, Jasper N. Broyles, Schmidt and Story, Franz Schmidt, Charles H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt and Henry Evans, the sum of Fifteen Thousand One Hundred and ninety-five and 58/100 dollars with interest thereon at the rate of ten per cent per annum from the 3rd day of July, A. D., 1908, until paid, together with the costs herein to be taxed by the Clerk of this Court, and that execution issue therefore.

It is further considered, ordered and adjudged by the court that the appellee the Bank of Commerce, do have and recover of and — H. Newman, Aug. Winkler, A. F. Katzenstein, Julius Campredon, Jacobo Sedillo, P. N. Yunker, Abran Abeyta, F. Fisher, W. H. Liles, J. J. Leeson, Lew Gatlin, Chas. Lewis, and Morris Lowenstein, as sureties in the supersedeas Bond in the above entitled cause, the sum of Fifteen Thousand One Hundred and Ninety-five and 58/100 dollars, with interest thereon at the rate of ten per cent per annum from the third day of July, A. D., 1908, until paid, together with costs herein to be taxed by the Clerk of this Court and that execution issue therefor.

And Afterwards, on towit, on the Seventh day of March, A. D., 1910, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for a rehearing in the above entitled cause, which said motion for a rehearing was and is in the following words and figures towit:

341 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

No. 1248.

THE BANK OF COMMERCE, Appellee,  
vs.  
JASPER N. BROYLES et al., Appellants.

Appeal from District Court, Socorro County.

And now comes the appellants in the above entitled cause and move the Court to grant a re-argument and re-consideration of the appeal in the above cause:

And for Grounds of the said Motion, these appellants respectfully specify:—

1. That one of the defenses relied upon by the defendants upon the trial was that the note in suit, when signed by the appellants, was blank as to the time of payment, and that the plaintiff filled in the blank with the words,—“On demand,” after the execution and without the authority from the defendants, and that such action constituted an alteration of their contract sufficient to discharge them; that the Court has ruled the evidence sufficient to raise an issue upon this point, but held that such defense was not presented by the pleadings.

That in so ruling the Court overlooked and misapprehended the contents of the answer as appears upon page 9 of the Appeal Book, wherein it alleges as follows:

“That at the time when defendants’ signatures were so, as aforesaid, obtained, the time when said notes were to be payable was in blank, and the defendants \* \* \* were left in ignorance of the intention to make said notes payable on demand, as appears from the copies thereof set forth in plaintiff’s said complaint \* \* \* and that at the time they were taken by plaintiff it has actual knowledge and notice \* \* \* of the fact that defendant Broyles, in

filling in said notes, so as to make them payable on demand  
342 *had been* was guilty of a breach of faith with these defendants.”

That under the rule that a pleading should be held to allege anything that by reasonable intendment can be inferred from its statements, the pleading must be held broad enough to cover the defense proven, which the court overlooked in its opinion.

2. That the Court overlooked and misapprehended the fact that if the defendant Lewis were released from liability on the note as a consequence of the fact that such release of Lewis would be also to relieve at least the defendants Schmidt, Story and Crossman, who were not upon the original notes and that the defendants Schmidt, Story and Crossman at least had a right to have the jury pass upon the question as to whether Lewis was so released, for the effect that such a verdict would have upon their rights.

That this defense is fully covered by the allegations in the answer that the signatures to the note were procured by fraud, and is fully met, if it be proven that any one of the signatures was produced by fraud, and that the Court overlooked in that connection the provision of Section 55 of the Negotiable Instrument Law which provides:

"That title of a person who negotiates an instrument is defective within the meaning of this Act when he obtaines the instrument or any signature thereto by fraud."

See Point 5, Original Brief for Appellant.

HOLT & SUTHERLAND,  
J. F. BONHAM,  
MARRON & WOOD,  
*Attorneys for Defendants and Appellants.*

And Afterwards, on towit, on the Thirty-fourth day of the said regular term, the same being Thursday, September 1st, A. D., 1910, the following among other proceedings were had and entered of record towit:—

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No. 1248.

THE BANK OF COMMERCE, Appellee,  
vs.

JASPAR N. BROYLES et al., Appellants.

Appeal from District Court, Socorro County.

This cause coming on before the court upon the motion of appellants for a rehearing herein and the court having had said motion under advisement, and being sufficiently advised grants said motion for rehearing and sets this cause for oral argument. It is therefore considered and adjudged by the court that the re-hearing of this cause be and the same hereby is granted and that this cause hereby is set for oral argument for the first day of the next January Term, 1911.

And Afterwards, on towit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government on the first Wednesday after the first Monday in January, A. D., 1911, on the first day thereof, the same being Wednesday, January 4th, A. D., 1911, the following among other proceedings were had and entered of record, towit:—

No. 1248.

THE BANK OF COMMERCE, Appellee,  
vs.

JASPER N. BROYLES et al., Appellants.

Appeal from District Court, Socorro County.

This cause again coming on before the court upon rehearing heretofore, herein granted, the same was argued by Francis E. Wood,

Esq., for Appellants, and H. M. Dougherty, Esq., for Appellee and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

344 And afterwards, on towit, on the Forty-sixth day of the said regular term, the same being Tuesday, December 21st, A. D., 1911, the following among other proceedings were had and entered of record, towit:

No. 1248.

THE BANK OF COMMERCE, Appellee,  
vs.  
JASPAR N. BROYLES et al., Appellants.

Appeal from District Court, Socorro County.

This cause again coming on before the court and having been re-argued and re-submitted to the court upon a former day of the present term, and the court having had the same under advisement and being now sufficiently advised in the premises, announces its decision by Associate Justice Wright, Chief Justice Pope and Associate Justices McFie, Roberts, and Mechem, Concurring, Associate Justice Abbott, dissenting, adhering to the opinion and judgment of the court as heretofore rendered herein, for reasons stated in the opinion of the court on file: It is therefore considered and adjudged by the court that the judgment and decree of this court herein, heretofore rendered be and the same hereby is adhered to.

And afterwards, on to-wit, on the seventeenth day of February A. D., 1912, there was filed in the office of the Clerk of the Supreme Court of the State of New Mexico, a supersedeas Bond in the above entitled cause, which said supersedeas Bond was and is in the following words and figures towit:

Know all men by these presents: That we, Franz Schmidt and Charles H. Story, both individually and as co-partners doing business under the firm name and style of Schmidt and Story; Henry Evans, Charles M. Crossman and Edward W. Brown; all of 345 the County of Socorro and State of New Mexico, as principals; and Joseph E. Spence and Charles Spence, as sureties; are held and firmly bound unto The Bank of Commerce of Albuquerque in the County of Bernalillo and State of New Mexico, in the penal sum of Thirty-five Thousand Dollars, (\$35,000.00) lawful money of the United States of America, to be paid to the said The Bank of Commerce, its certain attorneys, successors or assigns: for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twelfth day of January, in the year of our Lord one Thousand nine hundred and twelve.

Whereas lately in the Supreme Court of the Territory of New Mexico, in a suit pending in said Court between Schmidt & Story, Franz Schmidt, Charles H. Story, Charles M. Crossman, Edward W. Brown, William E. Pratt, and Henry Evans, appellants, and the Bank of Commerce, appellee, a judgment was rendered against said appellants and the sureties on their supersedeas bond on said appeal and the said appellants having obtained a writ of error and filed a copy thereof in the Clerk's office of said Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said The Bank of Commerce, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, within sixty (60) days after the service of the said writ of error;

Now, the condition of the above obligation is such that if the said Schmidt & Story, Franz Schmidt, Charles H. Story, Charles M. Crossman, Edward W. Brown, and Henry Evans, and their said sureties shall prosecute said writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then  
346 the above obligation to be void, else to remain in full force and effect.

FRANZ SCHMIDT.	[SEAL.]
SCHMIDT & STORY.	[SEAL.]
CHAS. M. CROSSMAN.	[SEAL.]
C. H. STORY.	[SEAL.]
H. EVANS.	[SEAL.]
E. W. BROWN.	[SEAL.]
JOSEPH E. SPENCE.	[SEAL.]
CHARLES SPENCE.	[SEAL.]

STATE OF NEW MEXICO,  
*County of Lincoln, ss:*

On this 19th day of January, A. D., 1912, before me came personally Joseph E. Spence and Charles Spence, who are respectively to me known to be the persons described in and who executed the foregoing instrument of writing as sureties thereto; and respectively acknowledged, each for himself, that they executed the same as their free act and deed, for the purposes therein set forth; and the said Joseph E. Spence and Charles Spence, being respectively by me duly sworn, each for himself, and not one for the other, sayd that he is a resident and free-holder of the County of Lincoln and State of New Mexico, and that he is worth the sum of Fifty Thousand Dollars (\$50,000.00) over and above his just debts and legal liabilities, and exclusive of property exempt by law from levy and sale under execution.

JOSEPH E. SPENCE.  
CHARLES SPENCE.

Acknowledged, subscribed and sworn to before me this 19th day of January, A. D., 1912.

(Signed)  
[SEAL.]

FRANK J. SAGER,  
*Notary Public.*

My Commission expires Nov. 13, 1913.

STATE OF NEW MEXICO,  
*County of Socorro, ss:*

On this 5th day of February, 1912, before me personally appeared Franz Schmidt, Charles H. Story, H. Evans, Charles M. Crossman, E. W. Brown, to me known to be the persons described in 347 and who executed the foregoing bond, and acknowledged that they executed the same as their free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

(Signed)

[SEAL.]

W. J. JOYCE,

*Notary Public.*

E. W. BROWN Interlined.

W. J. JOYCE,

*Notary Public.*

My Commission expires, February 9th, 1913.

The above and foregoing Bond is hereby approved, both as to form, manner of execution and the sufficiency of sureties thereon.

(Signed)

CLARENCE J. ROBERTS,  
*Chief Justice Supreme Court of New Mexico.*

And Afterwards, on towit, *on* the said the seventeenth day of February, A. D., 1912, there was filed in the office of the Clerk of the Supreme Court of the State of New Mexico, a Preceipe for record in the above entitled cause, which said preceipe was and is in the following words and figures towit:

In the Supreme Court of the State of New Mexico, January Term,  
A. D. 1912.

No. 1248.

FRANZ SCHMIDT and CHARLES H. STORY et al., Plaintiffs in Error,  
vs.

THE BANK OF COMMERCE, Defendant in Error.

Appeal from District Court, Socorro County.

To the Clerk of the Supreme Court of New Mexico:

You will please include in the return to the Supreme Court of the United States, upon the writ of error issued out of that Court in the above entitled cause, the following papers from the record, together with the certificate of the Clerk of the District Court, as to said papers, respectively:

- 348      1. The complaint in said cause appearing at pages 3 to 6 of the record.  
2. The answer appearing at pages 7 to 10, of the record.  
3. The reply appearing at pages 12 to 15 of the record.

4. The minutes of the opening of the trial appearing at page 19 of the record.
5. The minutes of the closing of the trial appearing at pages 20 to 22 of the record.
6. The motion for a new trial appearing at pages 22 to 27 of the record.
7. Order over-ruling the same appearing at page 31 of the record.
8. Supersedeas Bond appearing at pages 34 to 37 inclusive.
9. The Bill of exceptions appearing at pages 41 to 341 of the record.
10. All record entries of the Supreme Court of the Territory.
11. The motion for rehearing.
12. The Supersedeas Bond on Appeal to the United States Supreme Court.
13. This Praecept.
14. Original Opinion of the Supreme Court handed down February 28th, 1910.
15. Opinion of the Supreme Court of New Mexico adhering.  
Yours etc.

MARRON & WOOD,  
*Attorneys for Plaintiffs in Error.*

Due personal service of the foregoing praecipe is admitted this 12th day of February, 1912, and we do hereby waive the ten days' notice and consent that the record be returned to the Supreme Court as requested therein.

(Signed)

H. M. DOUGHERTY,  
J. G. FITCHY,  
*Attorneys for Defendants in Error.*

And Heretofore, on towit, on the 28th day of February, A. D. 1910, there was handed down and filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, and opinion by the court in the above entitled cause, which said opinion by the court, was and is in the following words and figures *following* towit:

349 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

No. 1248.

THE BANK OF COMMERCE, Appellee,

vs.

JASPER N. BROYLES et al., Appellants.

*Syllabus.*

Appeal from District Court, Bernalillo County.

1. A motion for a peremptory instruction by both parties does not constitute a final waiver by either of jury trial where the evidence

is conflicting and where after adverse ruling upon his request for peremptory instruction such party thereupon insists upon a trial by jury:

2. It is error for the Court to withdraw a case from the jury where the evidence as to liability is conflicting or the inferences on that subject to be drawn from the testimony are divergent.

3. It is the duty of the Court to direct a verdict where it would be bound to set aside a contrary verdict for want of testimony to support it.

4. To render a fraudulent misrepresentation securing the signing of a promissory note available in defense against it it must be shown that the defendant was damaged by such misrepresentation.

5. Where the plaintiff by knowingly false statements secured the signing by the defendants of a certain note but this latter was in satisfaction of a former note then due from the defendants for the same amount and on the same terms, which latter note thereby became and was cancelled and retired, such misrepresentation constitutes no defense to a suit on such second note, since the misrepresentation led simply to the defendants paying a debt due by them and they were thus in legal contemplation not damaged thereby.

6. It is not error to refuse to submit to the jury issues not raised by the pleadings.

350 7. The rule last stated is not rendered inoperative because the court may erroneously and over objection have admitted testimony upon such extraneous issues.

8. Payments subsequent to the filing of suit are not provable under the general issues but must be set up by supplemental pleading.

9. A dismissal seasonably entered by leave of the Court as to one of a number of defendants severally liable does not discharge from liability his co-obligors and co-defendants.

#### *Statement of the Case.*

The plaintiff bank brought suit upon two notes. These are identical in form except that the first is for ten thousand dollars and the second only for five thousand. On the latter note a credit is alleged of fifteen hundred dollars on April 15, 1908. The first of these notes is as follows:

"\$10,000.00      ALBUQUERQUE, NEW MEXICO, April 9th, 1908.

On demand after date (without grace) we jointly and severally promise to pay to the order of the Bank of Commerce, at the office of said Bank, in Albuquerque, New Mexico, Ten Thousand & No-100 Dollars with interest at the rate of ten per cent per annum from date until paid. Principal and interest payable in United States Gold Coin, for value received, and if the same shall not be paid when due, we jointly and severally agree to pay all costs of collection, includ-

4. The minutes of the opening of the trial appearing at page 19 of the record.
5. The minutes of the closing of the trial appearing at pages 20 to 22 of the record.
6. The motion for a new trial appearing at pages 22 to 27 of the record.
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10. All record entries of the Supreme Court of the Territory.
11. The motion for rehearing.
12. The Supersedeas Bond on Appeal to the United States Supreme Court.
13. This Præcipe.
14. Original Opinion of the Supreme Court handed down February 28th, 1910.
15. Opinion of the Supreme Court of New Mexico adhering.  
Yours etc.

MARRON & WOOD,  
*Attorneys for Plaintiffs in Error.*

Due personal service of the foregoing præcipe is admitted this 12th day of February, 1912, and we do hereby waive the ten days' notice and consent that the record be returned to the Supreme Court as requested therein.

(Signed)

H. M. DOUGHERTY,

J. G. FITCHY,

*Attorneys for Defendants in Error.*

And Heretofore, on towit, on the 28th day of February, A. D. 1910, there was handed down and filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, and opinion by the court in the above entitled cause, which said opinion by the court, was and is in the following words and figures *following* to wit:

349 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

No. 1248.

THE BANK OF COMMERCE, Appellee,  
vs.

JASPER N. BROYLES et al., Appellants.

*Syllabus.*

Appeal from District Court, Bernalillo County.

1. A motion for a peremptory instruction by both parties does not constitute a final waiver by either of jury trial where the evidence

is conflicting and where after adverse ruling upon his request for peremptory instruction such party thereupon insists upon a trial by jury:

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3. It is the duty of the Court to direct a verdict where it would be bound to set aside a contrary verdict for want of testimony to support it.

4. To render a fraudulent misrepresentation securing the signing of a promissory note available in defense against it it must be shown that the defendant was damaged by such misrepresentation.

5. Where the plaintiff by knowingly false statements secured the signing by the defendants of a certain note but this latter was in satisfaction of a former note then due from the defendants for the same amount and on the same terms, which latter note thereby became and was cancelled and retired, such misrepresentation constitutes no defense to a suit on such second note, since the misrepresentation led simply to the defendants paying a debt due by them and they were thus in legal contemplation not damaged thereby.

6. It is not error to refuse to submit to the jury issues not raised by the pleadings.

350 7. The rule last stated is not rendered inoperative because the court may erroneously and over objection have admitted testimony upon such extraneous issues.

8. Payments subsequent to the filing of suit are not provable under the general issues but must be set up by supplemental pleading.

9. A dismissal seasonably entered by leave of the Court as to one of a number of defendants severally liable does not discharge from liability his co-obligors and co-defendants.

\*

*Statement of the Case.*

The plaintiff bank brought suit upon two notes. These are identical in form except that the first is for ten thousand dollars and the second only for five thousand. On the latter note a credit is alleged of fifteen hundred dollars on April 15, 1908. The first of these notes is as follows:

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ing reasonable attorney's fees, if suit be brought on this note, or if attorneys are employed to collect the same.

G. P. ANDERSON.  
CHAS. LEWIS.  
H. EVANS.  
J. N. BROYLES.  
FRANZ SCHMIDT & STORY.  
CHAS. M. CROSSMAN.  
E. W. BROWN."

G. P. Anderson one of the signers of the notes is impleaded as William E. Pratt, that being apparently his real name. The defendant Broyles suffered default. The remaining defendants answered alleging in substance that they received no consideration for the notes and were merely accommodation signers thereon for the defendant Broyles; that their signatures were obtained by certain false and fraudulent representations made by plaintiff, which representations were in effect first, that the defendant Broyles was solvent and amply able to pay off all his just debts and liabilities, and second, that said notes were amply secured by collateral deposited by Broyles with plaintiff bank. There were also allegations that at the time the defendants signed the notes plaintiff promised that Broyles could and would take care of them and defendants would never hear of them again. It was also alleged that the date of payment was at the time left blank and the defendants were falsely and fraudulently informed by plaintiff that Broyles was to be given such time as he might require to pay the indebtedness and that defendants were left in ignorance that the notes were to be made payable on demand. A reply put the new matter at issue and the case was tried to a jury. On the trial testimony was received on behalf of both plaintiff and defendants and at the close of the case in rebuttal plaintiff moved for an instructed verdict. The defendants did the same. The Court thereupon announced that it sustained the motion of plaintiff as against all of the defendants except Lewis. Upon this announcement the plaintiff dismissed as to Lewis and the jury by direction of the Court then brought in a verdict against all of the remaining defendants for the full amount claimed in the complaint. A motion for a new trial was overruled and judgment entered pursuant to the verdict. Defendants thereupon appealed.

*Opinion of the Court.*

POPE, J.:

The chief assignment of error is that there was an issue of fact which the Court should have sent to the jury. At the outset we are met by the contention of Appellee that this alleged error of the Court in withdrawing the case from the jury cannot be considered because both sides requested a peremptory instruction and must therefore be considered as having stipulated that there was no issue of fact for the jury. The record upon this point, as above partially indicated, shows that upon the close of

the testimony plaintiff moved for an instructed verdict because the defense as pleaded was not sufficient and was not permissible under nor in conformity with the pleadings. Defendants likewise moved for a peremptory instruction, their ground being that the notes were signed in blank with the understanding that they were to run from four to six months and that having been filled out on demand they were therefore not collectible under section 14 of the Negotiable Instrument act of 1907. Upon the announcement of the court that it sustained the motion for a peremptory instruction against all of the defendants but Lewis and after the Court had permitted a non-suit as to the latter, the defendants insisted that "not only Lewis but his co-defendants are entitled to a decision at the hands of the jury in this case." This contention was overruled, and a verdict against the defendants, except the defendant Lewis, instructed by the Court. We are of the opinion that upon this state of the record the request by both sides for a peremptory instruction does not preclude the assignment of error made. It is true that in *Buetell v. Magone*, 157 U. S. 154, it was said:

"As however, both parties ask the Court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the Court find the facts and the parties are therefore concluded by the findings made by the Court upon which result the instruction of law was given."

We deem the full import of this holding developed, however, by the recent case of *Empire State Company v. Atchison Company* 210 U. S., 1, where it was said:

"It was settled in *Buetell v. Magone* (*supra*), that where both parties request a peremptory instruction, and do nothing more, they thereby assume the facts to be undisputed, and in fact, submit to the trial judge the determination of the inferences proper to be drawn from them; but nothing in that ruling sustains the view 353 that a party may not request a peremptory instruction, and yet upon the refusal of the Court to give it, insist, by appropriate requests, upon the submission of the case to the jury where the evidence is conflicting or the inferences to be drawn from the testimony, are divergent."

In *McCormick v. National City Bank*, 142 Fed. 132, it was pointed out that *Buetell v. Magone* was a case where there was no disputed question of fact, and it was there stated:

"The decision in that case should not be extended to cases in which there are disputed questions of fact nor to cases in which the parties ask other instructions in the event the peremptory instruction asked by them respectively are not given."

So in *Minehan v. G. T. Ry.*, 138 Fed., 37, it was said:

"But it would seem that the decision (*Buetell v. Magone*) cannot be regarded as furnishing a rule for cases where the evidence is conflicting and where the party whose request is refused has coupled with his request other requests directed to particular aspects of the case which repel the implication that the party had consented to a submission of the fact to the Court."

We think the language used by defendants' counsel after their request for a peremptory instruction had been denied was equivalent to a demand for a jury and, in the language of the case last quoted, repelled "the implication that the party had consented to a submission of facts to the Court", and constituted, under Empire State Company v. Atchison Company, *supra*, 'an insistence by appropriate requests upon the submission of the case to the jury.'

Believing, therefore, the question properly before us, we proceed to determine whether the Court upon the testimony erred in withdrawing the case from the jury. The rule in such matters, to quote further from Empire Company v. Atchison Company, *supra*, is that the case is one for a jury where the evidence as to liability is conflicting or the inferences on that subject to be drawn from the testimony are divergent. Or as it is stated somewhat differently in McGuire v. Blunt 199, U. S., 142.

354 "It is clear that where the Court would be bound to set aside a verdict for the want of testimony to support it, it may direct a finding in the first instance and not await the enforcement of its view by granting a new trial."

Was there any view of the testimony under which the defendants or either of them could properly have been awarded a verdict by the jury? The defense, as we have seen, was principally that the signing of the notes was procured by fraud. There was undoubtedly evidence that the defendant- Anderson, Evans, Brown and Lewis were told by plaintiff's representative prior to the signing the notes that Broyles was solvent and were further told that plaintiff had ample collateral for the notes, and there was also evidence from which the jury might have concluded that the defendants signed the notes in reliance upon these representations. We find also upon the record room for a conclusion by the jury that these statements were untrue and that they were known when made to be untrue. Indeed the trial Court recognized this, for as to Lewis, in whose favor the testimony on this point was no stronger than on behalf of Anderson, Evans and Brown, the Court held that the matter was one for the jury. Eliminating therefore Lewis, as to whom there was a dismissal and the defendants Schmidt, Story and Crossman, in whose favor there was no testimony as to representations inducing their signature, was there ground for a verdict relieving from liability either Anderson, Evans or Brown? The testimony shows that the notes sued on, together with an additional one of ten thousand dollars of the same date and not here in controversy, took the place of overdue notes of precisely the same amounts and tenor, dated November 20, 1907, signed by Broyles, Anderson Evans and Brown. Upon the giving of the present notes these former notes were surrendered by plaintiff bank and destroyed. No suggestion was made either on the trial or upon the argument before us that these first notes were not valid obligations of these three defendants nor that in retiring them by the new notes of precisely the same amounts defendants were not simply ridding themselves of a perfectly valid

355 outstanding obligation of as great an amount as the new notes signed. Applying these undisputed facts to those which the proofs left in controversy, were these defendants

defrauded in the making of these notes? Were actionable fraudulent representations simply the making of *a* false statements knowingly to another where by the latter is *let* to act, there would doubtless be here a case for the jury. But there is of course, a further essential element. The party must have been led to act to his injury. As stated in *Randall v. Hazelton*, 12 Allen, 412, quoting 3 Bulst 95:

"It is an ancient and well established legal principle that fraud without damage or damage without fraud gives no cause of action; yet when the two do concur there an action lies."

So in 1 Story's Esq. Jur. Section 203.

"The party must have been misled to his prejudice or injury, for courts of equity do not any more than courts of law sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked that to support an action at law for a misrepresentation there must be a fraud committed by the defendant and a damage resulting from such fraud to the plaintiff. And it has been observed with equal truth by a very learned judge in equity, that fraud and damage coupled together will entitle the injured party to relief in any court of justice."

So in *Morrison v. Lodds*, 39 Cal. 385, it is said:

"It is well settled that a party to contract cannot rescind or avoid a contract on the ground of a false representation of the other party unless he shows in addition to the false representation that he will be damaged by the performance of the contract."

In *Story v. Conger*, 36 N. Y., 673, 93 A. D. 546, it was said:

"Upon his own statement of the contract the defendant has done no more than he was legally bound to do. If unjust or immoral means have been resorted to to induce him to perform that duty there is no remedy. In its result the case stands where and as it ought to stand."

In a latter case from the same state, *Deobold v. Oppermann*, 111 N. Y. 531, 7 A. S. R. 760, it was held that there was no legal loss when the parties were "subjected to a liability which they agreed to assume in the event which is now alleged as the cause of their misfortune."

In *First National Bank of Showhegan v. Maxfield*, 22 Atlantic 479, the Supreme Court of Maine went to the extent of holding that mortgage securing a just debt, even if obtained by fraud, was enforceable, the following being the language:

"The payee by giving such mortgage merely secured his own debt and the representation to him by the bank as inducement to give the mortgage that the bill was unpaid if untrue is harmless and not fraudulent."

Further authority to the same effect will be found in *Ming v. Woolfolk*, 116 U. S. 599;—*Parker v. Jewett* (Minn.) 55 N. W. 56;—*Pheteplace v. Eastman*, 26 Ia. 446;—*Michigan v. Phoenix Bank*, 33 N. Y. 9;—*Mariner v. Dennison*, (Cal.) 20 Pac. 386;—*Snyder v. Heagan*, 40 S. W. 693; and cases cited to support the text in the following reference works 17 Ency. P. & Pr. 814; 20 Cyc. 42;—14 A. & E. Ency. Law (2nd Ed.) 137, et seq.

We deem the present case well within the rule above declared. Even assuming the notes to have been given as the result of a willful misrepresentation they added no new burden to these defendants. The latter were obligated thereby to no greater duty than previously rested upon them. What they are called upon to do as a result of giving the notes they were equally under obligation to perform before the notes were given. Applying the test in *Morrison v. Lods*, *supra*, they will "not be damaged by the performance of the contract" and under the rule in *Story v. Conger*, *supra*, "the result stands where and as it ought to stand" and the rule in *Deobold v. Oppermann*, *supra*, they are in the matter of results simply "subjected to the liability which they agreed to assume." Upon the undisputed facts, therefore, the jury could not have found for the defendants and the trial Court was right in so holding.

It is further claimed that the case should have gone to the jury upon an issue as to whether the blank in the note as to time 357 of payment had been filled in differently from what was agreed to at the time of signature. The testimony for the defense taken over objection that it was not warranted by the pleadings was to the effect that the time in the notes was left blank when they were signed and that it was the agreement that these were to be filled in at six months. The plaintiff's testimony in rebuttal was that the notes were filled out payable on demand, before the signature. But while this was over plaintiff's objection, made an issue on the proofs, it is not so upon the pleadings. We find nothing in the answer having the semblance of the defense that the notes were altered after signature or that they were filled in contrary to what was agreed at the time. It is true that the answer alleges the understanding to be that Broyles was to be given such time within which to pay the debt "as he might require." But this allegation would seem to go rather to the manner of enforcing collection than the form of the obligation. At most it was an allegation of an undertaking that the notes should be finally filled in for payment when Broyles got ready. But an allegation of even such an improbable provision for a promissory note is a different matter from that here quoted to the effect that the note was to be filled in at six months. It needs no argument to demonstrate the difference between an agreement to exact payment at a time indefinite and one at six months. Neither is the matter aided by the further allegation in the answer that the defendants "were left in ignorance of the intention to make the note payable on demand." Manifestly ignorance of an intention to make notes payable on demand is not tantamount to an agreement that they should be dated at six months. We are of the opinion therefore that this defense was not open to the defendants upon their pleadings and that the trial Court did not therefore err in withholding from the jury the determination of an issue not properly before it. It is urged however by the appellants that the Court admitted proof upon this question over plaintiff's objection that it was not within the pleadings and that plaintiff not having taken an appeal from such ruling it should not be 358 heard now to sustain the judgment upon a theory held against it on the trial. *Morgan v. Southern Pacific Ry.*

Co., (Cal.) 17 L. R. A. 71 and Wrangler v. Swift, 90 N. Y. 38 are cited to support this position. But how could plaintiff appeal from an adverse ruling on the testimony? Appeals, of course, lie only from final judgments and that judgment was in its favor. The defendants were notified by repeated objections on the trial—their brief says "something like one thousand"—that the plaintiff relied among other things upon defects in the pleading. Indeed one of the grounds of plaintiff's very motion to instruct, which the Court sustained, was that "the defense is not admissible under the state of the pleadings and does not conform thereto and the issues which have been raised thereby are not issues which have been raised by the pleadings." This was a further and definite notice that inadequacy in the pleadings was claimed as against defendants' contentions. The latter therefore in failing to amend proceeded at their peril and cannot now be heard to complain because the terms of their answer failed to justify the submission to the jury of an issue upon which defendants desired the jury's judgment. The rule that proof must be based upon pleadings is too well established to be made to yield to the contention here made.

The same observations apply to several other defenses which defendants complain the Court by giving the peremptory instruction failed to entertain. It is contended that the notes sued on were materially altered after signature by certain of the makers, by the addition of other parties thereto. But such a defense is not even remotely hinted at in the answer. It is stated that the Court failed to give credit for four payments, one made before the note was given, the other three all since the suit was brought. Clearly however, the first could not have been a payment on this note and equally clear is that in the absence of the proper plea these last were not matters for consideration. Even if, contrary to the current of authority, it be said that the code system permits proof of payment, under the general issues, it is clear that such proof is restricted to payments before and not after suit. Classcock v. Ashman, 52 Cal. 495; Heigler v. Eddy, 53 Cal. 597.

359 These latter must be set up by answer in the nature of a plea *puis darrein continuance*. The universal rule is stated in Philips on Code Pleadings, section 363, where it is said.

"Payments made pending the action can be asserted only as new matter and by means of a supplemental pleading."

Some reference is made to the payment of one thousand dollars alleged to have been made between the execution of the note and the filing of the suit but aside from the matter of the absence of any answer setting up such payment we discover in the record no testimony that would have justified a finding that such payment was made.

The only remaining assignment of error that we deem material is the contention that the granting of a non-suit as to the defendant Lewis operated as a discharge of the remaining defendants. The plaintiff however, had a right under Compiled Laws 2908 to dismiss as to Lewis, the cause not having been submitted to the jury. This dismissal was simply a discontinuance of the action, not a discharge

of the party. The obligations sued on both by their terms and by Compiled laws 2894 were several. We fail to see how a non-suit as to Lewis affected the liability of his co-defendants, nor do we see how under the record it could have resulted in their benefit for his portion of the case to have been carried forward to verdict. The Judgment is affirmed.

WM. H. POPE,  
*Associate Justice.*

We concur:

WILLIAM C. MILLS, *C. J.*  
JOHN R. McFIE, *A. J.*  
IRA A. ABBOTT, *A. J.*  
ALFORD W. COOLEY, *A. J.*

Associate Justice Parker, having tried the case took no part in the decision, nor did Associate Justice Mechem, who did not hear the argument.

360 And Afterwards, on towit, *on* the twenty-first day of December, A. D., 1911, there was filed in the office of the clerk of the Supreme Court of New Mexico, an opinion by the court on rehearing, adhering to the former decision of this court, which said opinion by the court on rehearing, was and is in the following words and figures towit:—

361 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

No. 1248.

BANK OF COMMERCE, Appellee,  
vs.  
JASPER N. BROYLES et al., Appellants.

Appeal from District Court, Socorro County.

*Opinion of the Court (on Rehearing).*

The original opinion filed in this cause shows that there was an issue of fact as to whether or not the defendant Charles Lewis had signed the note sued on as a result of fraud. As pointed out in that opinion the trial court recognized the existence of the issue and was about to send the case to the jury as to the defendant Lewis when plaintiff dismissed its action as to him, resulting in a judgment for plaintiff against the remaining defendants. The original opinion filed in this cause holds that the plaintiff had the right to dismiss as to Lewis and to proceed against the other defendants. The attention of the court, however, is called by a motion for a rehearing to a contention raised upon appellant's brief but not dealt with by the

court which contention appellant claims is decisive of this appeal. It is to the effect that assuming as the trial court held and as this court has also held in the original opinion that Lewis, one of the signers, was induced to sign by fraud, then this fact whether Lewis was or was not a party to the suit or whether judgment was or was not sought against him, constitutes a defense to the action available to the other signers under Sec. 55, of the Negotiable Instruments Act. (Laws of 1907, Chap. 83, Sec. 55) Impressed with the importance of this contention *on* the case was restored to the docket for further argument and has heretofore been reargued to the court upon this point.

Section 55 of the Negotiable Instruments Act is as follows:

362 "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force, fear or other unlawful means or for an illegal consideration or when he negotiates it, breach of faith, or any such circumstances as amount to a fraud."

The only cases bearing upon this section so far as cited in the briefs and so far as disclosed in Brennan's Negotiable Instrument Law (edition of 1911) are from Wisconsin, being the cases of Hodge v. Smith 130 Wis. 326, 110 N. W. 192 and Aukland v. Arnold, 131 Wis. 64, 11 N. W. 212. In both of these cases it is held that where one of the signatures is obtained by fraud it is a defense available to all signers. In the latter case after quoting the Wisconsin section which embodies in precisely the same language what is contained in our Section 55 it is said:

"The first clause of this section was considered and interpreted in the recent case of Hodge v. Smith 130 Wis. 326, 110 N. W. 192. It was there held that the title of a person who negotiates commercial paper is defective when he has obtained any signature thereto by fraud, and that if the parties so defrauded be relieved from liability thereon, then such fraud makes such paper voidable by all other persons who signed it, though they did not participate in and were ignorant of such fraudulent conduct at the time they signed it. This conclusion was reached upon the ground that, when several persons assumed such an obligation it is material and important that all who join as makers should share equally in bearing the burden of its payment, and if, through the fraud of the person holding it, such equality of burden is distributed and the burden increased as to some of the persons signing it, such fraud renders the title defective as to all of the persons who signed it."

For an intelligent understanding of the effect of this section of the Negotiable Instrument law upon the case at bar it is necessary to make a further brief statement of the facts supplementary to that contained in the original opinion.

363 The complaint sets out in full the notes sued on with the usual allegations of nonpayment, etc., The answer after denying any indebtedness on account of said notes sets up fraud in the obtaining of certain of the signatures to such notes thereby seeking to avoid liability as to each and every one of the defendants.

The sufficiency of the allegations of fraud was questioned in the lower court. This question however was disposed of in the original opinion and will not be discussed further upon a rehearing. Upon a trial of the issues the plaintiff introduced the notes in evidence, proved that the same were due and unpaid and then rested. The defendants then offered evidence to show that the signatures of three of the defendants and particularly the defendant Lewis were obtained by the plaintiff through fraudulent representations. It developed in the course of the trial that the signatures of the defendants Broyles, Schmidt, Story and Crossman were placed upon the notes at one time and that those of the defendants Lewis, Anderson and Evans at a later date after the notes in question had been sent up — Albuquerque and either sent back to Broyles or brought by the witness Johnson, the agent of the plaintiff. It also appeared from the evidence as stated in the original opinion that the defendant Brown, Evans and Anderson had previously signed notes for Broyles for similar amounts and that the notes involved herein were executed for the purpose of taking up the former notes. There is no evidence whatever in the record as to whether the defendants Schmidt, Story and Crossman or any of them had any knowledge that there were to be any other signers than themselves. There is a complete silence in the record as to whether they knew anything about Lewis, Evans, Anderson or even Brown as co-signers of these notes. In discussing the effect of fraud upon the signers of a note it is held in the original opinion that the defense of fraud is alleged and proven in the case at bar is not available where the instrument induced by fraud simply retires a preexisting valid obligation of the same amount and of like tenor and this for the reason that such signer

has not in contemplation of law been misled to his injury.

364 We are of the opinion that the section of the Negotiable

Instrument law (cited) does not change this rule, nor is there anything in the two Wisconsin cases (cited) which is in conflict with the rule laid down in the original opinion. It only remains to consider what effect if any the fraud practiced upon other co-signers had upon the defendants Schmidt, Story and Crossman who were new signers upon the notes involved herein. It is apparent from the record that the defendants Schmidt, Story and Crossman having established the fraud as to Lewis relied upon the provisions of Section 55 of the Negotiable Instrument Act to relieve them from liability without any necessity on their part of any further showing of injury to themselves. If Schmidt, Story and Crossman had signed the notes after the signatures of the other co-signers against whom fraud was practiced had been attached to the same. It is undoubtedly true under the reasoning of the court in the Wisconsin cases that they should have rested without any further showing of injury since the release of any one of such co-signers would have distributed the equality of the burden as to them, (namely the defendants Schmidt, Story, and Crossman) they having the right in the absence of any proof to the contrary to assume that each and every one of the signers of the note who signed before them signed the same unconditionally and that each signer in event of the other

having to pay for said note would be liable to the same extent as they themselves.

In the case at bar, however, the signers against whom fraud was practiced signed the notes several days after their execution by Schmidt, Story and Crossman. So far as the record in this case shows the notes were complete and binding obligations upon Schmidt, Story and Crossman at the time they executed the same with no contemporaneous agreement of any kind that such notes were to have further or other signers. Such being the terms of their contract the release of any subsequent co-signers, because of fraud in the obtaining of the signatures of such subsequent co-signers, would 365 not disturb the equality of burden as to Schmidt, Story or

Crossman. It was incumbent therefore upon the defendant-Schmidt, Story and Crossman to have proven injury to themselves because of the fraud practiced upon their subsequent co-signers in order to relieve themselves from liability because of such alleged fraud. This they failed to do so far as the record in this case discloses.

Except as herein modified the original opinion is therefore adhered to.

EDWARD R. WRIGHT,  
*Associate Justice.*

We Concur:

WILLIAM H. POPE, *C. J.*  
JOHN R. McFIE, *A. J.*  
CLARENCE J. ROBERTS, *A. J.*  
MERRITT C. MECHEM, *A. J.*

366 STATE OF NEW MEXICO,  
*Supreme Court, ss:*

I, Jose D. Sena, Clerk of the Supreme Court of the State of New Mexico, do hereby certify that the above and foregoing three-hundred and sixty five (365) pages contain a full, true, complete and correct transcript of the record and proceedings, pleadings and opinions in the above entitled cause, which hereby are transmitted to the Supreme Court of the United States, in accordance with a writ of error heretofore issued herein and hereto attached and made a part hereof.

Witness my hand and the seal of the Supreme Court of the State of New Mexico, this the 19th day of February, A. D. 1912.

[Seal Supreme Court, Territory of New Mexico.]

JOSE D. SENA,  
*Clerk Supreme Court of New Mexico.*

367        In the Supreme Court of the United States.

SCHMIDT & STORY, FRANZ SCHMIDT, CHARLES H. STORY and others,  
Plaintiffs in Error,

vs.

THE BANK OF COMMERCE, Defendant in Error.

Comes now, the plaintiffs in error in the above cause, by Marron & Wood, their attorneys and shows to the court that in the record, proceedings and judgment in this cause, there is manifest error to the prejudice of the said plaintiffs in error in the following particulars and specifications, to-wit:

1.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court against the plaintiffs in error.

2.

The Supreme Court of New Mexico erred in over-ruling the motion of the plaintiffs in error for a re-hearing.

3.

The District Court erred in granting the judgment against the plaintiffs in error and the Supreme Court erred in refusing to consider said action as error.

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4.

The District Court erred in over-ruling the motion of the plaintiffs in error for a new trial of said cause and the Supreme Court erred in refusing to consider such ruling as error.

5.

The District Court erred in granting the motion of the plaintiff below for an instruction to the jury to find the issues against the plaintiffs in error and the Supreme Court erred in refusing to consider such act as error.

6.

The District Court erred in over-ruling the motion of the plaintiffs in error to instruct the Jury to return a verdict in their favor and the Supreme Court erred in refusing to consider such act as error.

7.

The District Court erred in permitting the plaintiff to take a non-suit as to the defendant Lewis and the Supreme Court erred in refusing to consider such act as error.

8.

The District Court erred in refusing to instruct the jury to credit the amount of the Golden Bell note in the sum of \$5938.47 upon the

amount of the note as against the plaintiffs in error and the Supreme Court erred in refusing to consider such action as error.

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9.

The District Court erred in refusing to submit to the jury the question as to whether or not the signatures of the plaintiffs in error or any one of them were secured, to the notes in suit, by false and fraudulent representations made to them by the plaintiff or its agents and the Supreme Court erred in refusing to consider such act as error.

10.

The District Court erred in refusing to submit to the jury the question as to whether or not the signature of the defendant Lewis was secured, to the notes in suit, by false and fraudulent representations sufficient to release and discharge the said Lewis from the payment of said notes and the Supreme Court erred in refusing to consider such act as error.

11.

The District Court erred in ruling that no demand was necessary on the sureties in this case to pay the note before the institution of suit thereon, and the Supreme Court erred in refusing to consider such act as error.

12.

The Supreme Court erred in ruling that the answer was insufficient to sustain the defense that the release of the defendant Lewis, because his signature secured through false and fraudulent representations, would operate to release the other defendants.

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13.

The Supreme Court erred in ruling that the answer was insufficient to sustain the defense established by the evidence; that the signature of the defendant Lewis being secured to the note in suit after the signatures of the other defendants and without their consent, operated to void and discharge the note as to them.

14.

The Supreme Court erred in ruling that the discharge of the defendant Lewis because of false and fraudulent representations in securing his signature caused no damage to the other defendants and therefore would not operate to discharge them.

15.

The Supreme Court erred in holding that the evidence showing that the date of payment of the note was changed after execution was incompetent under the pleadings.

16.

The District Court erred in excluding evidence offered to show representations made by the defendant Broyles to the other defendants and the Supreme Court erred in refusing to consider such act as error.

17.

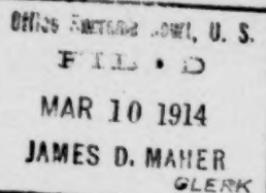
The District Court erred in refusing to rule that the complaint does not state a cause of action and the Supreme Court erred in refusing to consider such act as error.

371 Wherefore, the plaintiffs in error pray that the judgment of the Supreme Court of New Mexico be reversed and the case remanded for further proceedings.

MARRON & WOOD,  
*Attorneys for Plaintiffs in Error.*

372 [Endorsed:] No. —. In the Supreme Court of the United States. Schmidt & Story et al. vs. Bank of Commerce. Assignment of Errors. Marron & Wood, Albuquerque, N. M., Attorneys for — — —.

Endorsed on cover: File No. 23,259. New Mexico Territory Supreme Court. Term No. 281. Schmidt & Story. Franz Schmidt, Charles M. Story, Charles M. Crossman et al., plaintiffs in error, vs. The Bank of Commerce. Filed June 17, 1912. File No. 23,259.



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## BRIEF FOR PLAINTIFFS.

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### IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1913

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No. 281

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SCHMIDT AND STORY, FRANZ SCHMIDT,  
CHARLES M. STORY, CHARLES M.  
CROSSMAN, ET AL., *Plaintiffs in  
Error.*

vs.

THE BANK OF COMMERCE.

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O. N. MARBON,  
FRANCIS E. WOOD,  
Attorneys for Plaintiffs in Error.  
Albuquerque, N. M.

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IN THE SUPREME COURT OF THE UNITED  
STATES.

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October Term, 1913.

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No. 281.

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SCHMIDT AND STORY, FRANZ SCHMIDT,  
CHARLES M. STORY, CHARLES M.  
CROSSMAN, ET AL., *Plaintiffs in  
Error.*

VS.

THE BANK OF COMMERCE.

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BRIEF FOR PLAINTIFFS.

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In error to the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the Third Judicial District Court in that Territory entered upon a verdict directed in favor of the plaintiff in an action on promissory notes.

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STATEMENT.

The action was brought to recover on two demand notes, one for \$10,000 and one for \$5,000, purporting to be executed by all the defendants below, payable to the order of the plaintiff.

The complaint instead of the usual averments

(2)

of execution, delivery, ownership and non-payment merely alleged:

"That all of said defendants are indebted to plaintiff on a promissory note of which the following is a copy."

and after copying the note continued:

"There are no credits nor endorsements upon said note and there is due and owing plaintiff" the amount thereof."

The allegation as to the second note was the same as the first except that the statement as to credits was as follows:

"The following is the only credit and endorsement upon said note 'April 16, 1908 paid \$1500.' "

The only other allegations in the complaint are that each defendant, naming him, "is the same person who signed said note as \* \* \*" setting forth the name as signed to the note.

It is submitted that this states no cause of action.

All the defendants except Broyles answered, first, denying specifically each and every allegation of the complaint. For a second defense they set up that the notes were for a pre-existing debt due from the defendant Broyles to the plaintiff; that the other defendants signed as sureties for

Broyles and that their signatures were obtained by false and fraudulent representations made by plaintiff's agent to them that Broyles was solvent and that they knew him to be financially sound, and that the notes were secured by ample collateral held by the plaintiff; and a further defense that the notes when signed by them were in blank as to the time of payment and they were advised that they were to be time notes and as much time as Broyles desired should be given to meet them, and that the defendants were kept in ignorance of the then existing intention on the part of the plaintiff to fill in the blank so as to make the notes payable on demand.

The plaintiff replied not denying the allegation that the notes were given to secure a pre-existing debt of Broyles with the other defendants as sureties, but specifically denied all the other allegations of the answer.

Upon the trial before the court and a jury the plaintiff produced the notes, proved that they were unpaid and without other proof of their execution or delivery offered them in evidence, and they were admitted over the objection of the defendant that no proper foundation was shown for their admission (24). This ruling is assigned as error.

The evidence received by the court showed briefly the following facts: The defendant Broyles had for several years been running a general

mercantile business in the village of San Marcial, New Mexico, and operated in connection therewith a bank, the plaintiff being his principal banking correspondent. Broyles had been gradually getting deeper in debt to the plaintiff and on November 20, 1907, owed it more than \$25,000. On that date Broyles executed three notes to the plaintiff aggregating \$25,000, signed by himself and the defendants Pratt, Evans and Brown as sureties. The terms of these notes, their rate of interest, or whether or not they contained provision for attorneys fees nowhere appears in the record. These notes were secured by collateral but Broyles' indebtedness increasing to over \$10,000 additional, plaintiff sent its agent and assistant cashier to make an examination of his affairs, and the collateral was then negotiated to the plaintiff and the ten thousand dollar indebtedness paid with the proceeds. The plaintiff then sent three other notes to Broyles for execution to take the place of the three previously given. Broyles signed these notes and procured the defendants Schmidt, Story and Crossman to sign with him as sureties and sent them to the plaintiff. Defendants sought to show that Broyles secured the signatures of these sureties by fraudulent means, and that plaintiff was chargeable with notice of that fact, but the evidence was ruled out by the court on the ground that the plaintiff was not bound by Broyles' actions. The plaintiff wanted additional signers and

sent its assistant cashier back to Broyles with the notes for the purpose of getting the other signatures. The defendants Brown, Lewis, Anderson and Evans were sent for and they at first declined to sign but on being assured by the cashier that he had examined Broyles' affairs and that Broyles was sound and solvent, that he was to be given all the time he needed to pay the notes and that the bank had ample collateral but wanted the signatures to make a good showing before its directors and the bank examiner, they signed the notes relying upon this assurance. No notice of this was given the prior signors. They all testified that the time the notes were payable was then in blank and they were assured that Broyles would be given all the time he required, and to some of the defendants the time was stated as six months.

The view of the facts established by the evidence is thus stated in the opinion of the court below:

"There is undoubtedly evidence that the defendants Anderson, Evans, Brown and Lewis were told by plaintiff's representative, prior to the signing of the notes, that Broyles was solvent, and were further told that the plaintiff had ample collateral for the notes; and there was also evidence from which the jury might have concluded that the defendants signed the notes in reliance upon these representations. We find also upon the record room for a conclusion by the jury that these

statements were untrue and that they were known when made to be untrue. Indeed the trial court recognized this for as to Lewis in whose favor the testimony on this point was no stronger than on behalf of Anderson, Evans and Brown the court held that the matter was one for the jury." (354)

"The testimony for the defense \* \* \* was to the effect that the time in the notes was left blank when they were signed and that it was the agreement that these were to be filled in at six months." (357)

"It developed in the course of the trial that the signatures of the defendants Broyles, Schmidt, Story and Crossman were placed upon the notes at one time and that those of the defendants Lewis, Anderson and Evans (also Brown) at a later date after the notes in question had been sent up to Albuquerque and were sent back to Broyles or brought by the witness Johnson the agent of the plaintiff. \* \* \* There is no evidence whatever in the record as to whether the defendants Schmidt, Story and Crossman or any of them had any knowledge that there were to be any other signers than themselves. There is a complete silence in the record as to whether they knew anything about Lewis, Evans, Anderson or even Brown as co-signers of these notes." (363)

From this the court draws the conclusion.

which the jury must have drawn from the facts, that the addition of the latter names was without the knowledge or consent of the earlier signers.

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#### THE DECISION.

This being the state of the proofs, at the close of the evidence both sides moved for an instructed verdict each in his own favor, which motions were disposed of by the court in the following language: (311).

"Motion to instruct for the plaintiff against all the defendants is sustained except as against the defendant Lewis, and the motion to instruct for the defendants is denied."

Thereupon the plaintiff asked leave to take a non-suit as to the defendant Lewis, to which the defendants objected, insisting that they had a right to go to the jury upon the issues of fraud as to Lewis. Their objection was overruled and exception taken and the non-suit as to Lewis was allowed.

The defendants then made various other requests to instruct the jury, all of which were denied, and the jury by direction of the court returned a verdict for the plaintiffs and against the defendants named for \$15,195.58.

Motion for a new trial having been filed and overruled judgment was entered on the verdict and an appeal was allowed to the Supreme Court of

New Mexico which affirmed the judgment.

Upon this record the following contentions more particularly specified in the assignments of error, are presented to the court.

It is first contended that the complaint states no cause of action and therefore furnishes no sufficient basis for the judgment; and this point while not made in the trial court was distinctly asserted in the Supreme Court (270) but received no consideration in the opinion.

If the allegations in the complaint "that the defendants are indebted to the plaintiff upon the notes," and "that there is due and owing the plaintiffs thereon" be treated as statements of fact and considered as equivalent to allegations that the notes were duly executed and delivered, that the plaintiff was the owner and that they were unpaid; then the answer expressly denied those allegations, and the court erred in admitting the notes in evidence without proof of their proper execution and delivery as legal instruments.

The instruments signed by Broyles and Smith, Story and Crossman were completed instruments and when the plaintiff procured other persons to sign them thereafter, he materially altered the notes with the necessary result that he destroyed them as against the earlier signers; and such a contention need not be specially pleaded but is admissible under general denial.

Conceding that the evidence sufficiently showed that Brown, Evans and Anderson were induced to sign the notes in suit through fraud, the court held that because they were then liable on other notes of like amount, though different as to makers, which were to be retired by the notes in suit, they were estopped to claim fraud because not damaged.

Conceding likewise that the evidence warranted the release of Lewis for fraud in securing his signature, it was held that this had no effect on the earlier signers, *because they never knew that he was to be a party with them*; nor on the later ones because they were liable for a like amount any way and it didn't matter to them what kind of a contract they were held on.

The plaintiffs in error together with Lewis all signed the papers sued on as sureties for Broyles' debt. By that act either they all did become parties to the contract or else they did not. If they did, the release of Lewis released them all. If they did not, it was error to hold them on it.

While the foregoing substantially covers the points intended to be raised and discussed in this brief they are more in detail set forth in the following assignments of error:

#### I.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court against the plaintiffs in error.

II.

The Supreme Court of New Mexico erred in overruling the motion of the plaintiffs in error for a re-hearing.

III.

The District Court erred in granting the judgment against the plaintiffs in error and the Supreme Court erred in refusing to consider said action as error.

IV.

The District Court erred in overruling the motion of the plaintiffs in error for a new trial of said cause and the Supreme Court erred in refusing to consider such ruling as error.

V.

The District Court erred in granting the motion of the plaintiff below for an instruction to the jury to find the issues against the plaintiffs in error and the Supreme Court erred in refusing to consider such act as error.

VI.

The District Court erred in overruling the motion of the plaintiff in error to instruct the jury to return a verdict in their favor and the Supreme Court erred in refusing to consider such act as error.

VII.

The District Court erred in permitting the plaintiff to take a non-suit as to the defendant Lewis and the Supreme Court erred in refusing

to consider such act as error.

VIII.

The District Court erred in refusing to instruct the jury to credit the amount of the Golden Bell note in the sum of \$5938.47 upon the amount of the note as against the plaintiffs in error and the Supreme Court erred in refusing to consider such action as error.

IX.

The District Court erred in refusing to submit to the jury the question as to whether or not the signatures of the plaintiffs in error or any one of them were secured, to the notes in suit, by false and fraudulent representations made to them by the plaintiff or its agents and the Supreme Court erred in refusing to consider such act as error.

X.

The District Court erred in refusing to submit to the jury the question as to whether or not the signature of the defendant Lewis was secured, to the notes in suit, by false and fraudulent representations sufficient to release and discharge the said Lewis from the payment of said notes and the Supreme Court erred in refusing to consider such act as error.

XI.

The District Court erred in ruling that no demand was necessary on the sureties in this case to pay the note before the institution of suit thereon,

and the Supreme Court erred in refusing to consider such act as error.

XII.

The Supreme Court erred in ruling that the answer was insufficient to sustain the defense that the release of the defendant Lewis, because his signature secured through false and fraudulent representations, would operate to release the other defendants.

XIII.

The Supreme Court erred in ruling that the answer was insufficient to sustain the defense established by the evidence; that the signature of the defendant Lewis being secured to the note in suit after the signatures of the other defendants and without their consent, operated to void and discharge the note as to them.

XIV.

The Supreme Court erred in ruling that the discharge of the defendant Lewis because of false and fraudulent representations in securing his signature caused no damage to the other defendants and therefore would not operate to discharge them.

XV.

The Supreme Court erred in holding that the evidence showing that the date of payment of the note was changed after execution was incompetent under the pleadings.

XVI.

The District Court erred in excluding evidence offered to show representations made by the defendant Broyles to the other defendants and the Supreme Court erred in refusing to consider such act as error.

XVII.

The District Court erred in refusing to rule that the complaint does not state a cause of action and the Supreme Court erred in refusing to consider such act as error.

XVIII.

The Supreme Court erred in ruling that the answer was insufficient to support the defense that the notes in suit were materially altered and destroyed as against the defendants Schmidt, Story and Crossman when the plaintiff thereafter procured the signatures of the other defendants thereto without the knowledge or consent of the former.

XIX.

The District Court erred in ruling that the notes remained valid and binding obligations against the defendants Schmidt, Story and Crossman notwithstanding that the notes were afterwards altered by the addition of other makers thereto.

XX.

The District Court erred in receiving the notes exhibit A and B in evidence over the objection of the defendant that no proper foundation was laid

for their introduction, (p. 24) and the Supreme Court erred in refusing to consider such action as error.

**XXI.**

The District Court erred in refusing to submit to the jury the question as to whether the notes were filled in to make them payable on demand after they had been delivered and without authority of the defendants and the Supreme Court erred in refusing to consider such action as error.

**XXII.**

The Supreme Court erred in ruling that it was necessary for the defendant Brown, Evans and Anderson to show pecuniary loss or damage resulting to them from having signed the notes before they could get the benefit of the defense, that they were induced to sign the same by fraud.

**XXIII.**

The Supreme Court erred in ruling that the defendants were not entitled to show payment on the notes under the pleadings.

**XXIV.**

The Supreme Court erred in refusing to rule that the defendants, other than Broyles, were sureties and as such were released by the material changes in the notes made and assented to by the plaintiff.

## POINTS AND AUTHORITIES.

## POINT I.

**The complaint states no cause of action and is insufficient to sustain the judgment.**

New Mexico adopted the code system of pleading in 1897, and its code now appears as sub-sections of Section 2685 of the Compiled Laws of that year. The code as adopted is with few changes the original Field code adopted in New York in 1849 omitting the special features as to organization of courts, etc., contained in that code. By sub-sec. 32 it is provided:

"The complaint must contain:

I. The title of the action, the name of the court and county in which the action is brought and the names of the parties to the action.

II. A statement of the facts constituting the cause of action in ordinary and concise language.

III. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded the amount thereof must be stated.

The only difference between this section and the New York code as finally adopted is that the latter contains the words "without unnecessary repetition" added to paragraph II. These are omitted in the New Mexico code.

The complaint contains none of the following necessary allegations:

1. That the defendants made or executed the note in suit;
2. That it was delivered to the plaintiff;
3. That the plaintiff is the owner of the note;
4. That it has not been paid.

*Van Giesen vs. Van Giesen*, 10 N. Y. 316.

It merely alleges:

"That the defendants are indebted to the plaintiff upon a note a copy of which," is set forth.

That this allegation is not one of fact but instead of a legal conclusion is well settled by authorities.

*Roberts vs. Treadwell*, 50 Cal. 520.

*California etc. Tel. Co. vs. Patterson*, 1 Nev. 150.

*Frasier vs. Williams*, 15 Minn. 288-294.

*Tate vs. Am. Wool Co.* 114 App. Div. 106.

An allegation that the note has not been paid, is essential.

*Lent vs. N. Y. & M. R. Co.*, 130 N. Y. 504.

*First Nat. Bank vs. Silver*, 122 Pac. 584.

*Van Giesen vs. Van Giesen*, 10 N. Y. 316-17.  
*Miners vs. Bank*, 2 Ala. 294.  
*Rogers vs. James*, 33 Ark. 77.  
*Smith vs. Carley*, 8 Ind. 451.  
*Calahan vs. Bank*, 78 Ky. 604.  
*Taylor vs. Newman*, 77 Mo. 257.  
*Ketellas vs. Meyers*, 3 E. D. Smith 83.  
*Penn. Nat. Bk. vs. Soap Co.*, 161 Pa. St. 241.  
*Fisher vs. Phelps*, 21 Tex. 551.

Even if the allegations in the complaint intending and purporting to identify the defendants with the names appearing on the note, could be stretched by construction to include an allegation that the defendants specified did sign the note, and if the legal conclusion that there was an amount due the plaintiffs could likewise be construed as an allegation that no greater amount had been paid there still remains a total want of allegation that the note was delivered to the plaintiff or that the plaintiff was the owner thereof.

This point is available in this court although not raised by demurrer or upon the trial.

It was contended on behalf of the plaintiff in the court below that this point was not available because not raised on the trial, and the Supreme Court apparently ignored the point altogether.

The New Mexico code after specifying how certain objections to the complaint may be taken continues in sub-sec. 39:

"If no such objection be taken either by demurrer or answer the defendant shall be deemed to have waived the same excepting only the objection to the jurisdiction of the court over the subject matter of the action, *and excepting the objection that the complaint does not state facts sufficient to constitute a cause of action.*"

It is quite universally the rule that the objection that the complaint does not state a cause of action may be taken at any time even upon appeal.

*Slacum vs. Pomeroy*, 6 Cranch, 221.

And authorities below cited.

And that rule is expressly held to prevail in New Mexico.

*Canavan vs. Canavan*, 131 Pac. 493, in which the court says:

"It is to be admitted, without argument, that the objection that a complaint fails to state facts sufficient to constitute a cause of action may be successfully interposed at any stage of the proceedings, and may be so interposed for the first time in an appellate court. 2 Cyc. 680; *Nichols v. Board of Co. Com.*, 13 Wyo. 1, 3 Ann. Cas. 543, and note."

The note referred to in this opinion appended in 3 Ann. Cas. 543 fully sets forth the authorities both in this court and the state courts to that

effect, and the court is respectfully referred to that list for further authorities upon the question.

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POINT II.

**The notes in suit were materially altered by the plaintiff after delivery and without the consent of the defendants and their legal character as binding contracts were thereby destroyed.**

The notes were materially altered after execution in the three particulars following:

- a. They were first executed by Broyles, Schmidt, Story and Crossman and delivered to the plaintiff, who later caused them to be signed by the four other defendants without the knowledge or consent of the earlier signers.
- b. The notes were delivered with the time of payment blank but with the understanding and agreement that they were to be filled in as time notes for six months. The plaintiff in violation of this understanding filled them in as demand notes.
- c. The act of the plaintiff in fraudulently misleading Lewis altered the notes by releasing him as a maker.

In the opinion of the Territorial Supreme Court upon the rehearing it is said:

"It developed in the course of the trial

that the signatures of the defendants Broyles, Schmidt, Story and Crossman were placed upon the notes at one time, and that those of the defendants Lewis, Anderson and Evans at a later date after the notes in question had been sent up to Albuquerque, and either sent back to Broyles or brought by the witness Johnson the agent of the plaintiff. \* \* \* There is no evidence whatever in the record as to whether the defendants Schmidt, Story and Crossman or any of them, had any knowledge that there were to be any other signers than themselves." (290)

This proof was not only admitted in evidence without objection it was introduced by the plaintiff itself. (162-3)

It thus appeared that when the note was signed by Broyles Schmidt, Story and Crossman, it was a completed instrument and the plaintiff after delivery procured other signers thereto.

The court expressly finds this as a fact. It says:

"So far as the record in this case shows the notes were complete and binding obligation upon Schmidt, Story and Crossman at the time they executed the same with no contemporaneous agreement of any kind that such notes were to have further or other signers." (291)

The Negotiable Instrument Law, Sec. 124, Chap. 83 of the Laws of New Mexico of 1907 provides:

"Where a negotiable instrument is ma-

terially altered without the assent of all parties liable thereon it is void except as against a party who has himself made, authorized or assented to the alteration and subsequent endorsers."

And by Sec. 125 it is provided:

"Any alteration which changes

I. The date.

II. The sum payable either for principal or interest.

III. The time or place of payment.

IV. *The number and the relations of the parties.*

V. The medium of currency in which payment is to be made or which adds a place of payment where no place of payment is specified or any other change or addition which alters the effect of the instrument in any respect: is a material alteration."

This was the rule before the adoption of the Negotiable Instrument Act.

In Daniel on Negotiable Instruments, 4th Ed. Sec. 1387 the rule is stated as follows:

"When there are several makers or co-sureties the addition of another maker or co-surety constitutes a material alteration, for the addition of another maker destroys the integrity of the original contract and the addition of another co-surety changes the right of the sureties in respect to the proportion of contribution for which each is liable to the others."

It would seem to follow irresistably from the foregoing authorities that the addition of these makers destroyed the note as a binding obligation of the prior makers.

d. The lower court also concedes that the evidence showed the agreement that the blank should be filled in as a six months or time note; it says:

"The testimony for the defense taken over the objection that it was not warranted by the pleadings was to the effect that the time in the notes was left blank when they were signed, and that it was the agreement that these were to be filled in at six months. The plaintiff's testimony in rebuttal was that the notes were filled out payable on demand before issue, but while this was over plaintiff's objection made an issue on the proofs it was not so upon the pleadings." (286)

We will discuss the sufficiency of the pleading in a subsequent point; it is sufficient for the present that an issue was raised on that point by the evidence.

Section 14 of the Negotiable Instrument Laws above cited provides:

"Where an instrument is wanting in any material part the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. \* \* \* In order, however, that any such instrument when completed may be enforced against any party who

became a party thereto prior to its completion it must be filled up strictly in accordance with the authority given and within a reasonable time."

The authority if any given by appellants to Johnson to fill in any blank on the note after they had signed it was to make it payable six months after date. By filling in the note payable on demand Johnson not only deprived appellants of the right to insist that it was incomplete on its face and therefore constructive notice of equities, but changed a six months note into one payable on demand. Such a change is clearly material and voids the instrument. The note in the condition in which it was signed, containing a blank, if left that way would be notice to holders of its infirmities, and by filling the blank the note was so far changed as to deny the defendants the benefit which this notice would carry to an innocent purchaser.

Chapter 52 of the Negotiable Instrument Laws provides:

"A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular on its face. \* \* \*
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument."

And Sec. 14 of the same act contains the provision:

"But if any such instrument after completion is negotiated to a holder in due course it is valid and effectual for all purposes in his hands and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

Whether therefore the filling in the words on demand in the blank be considered as a violation of an express agreement that it should be filled in at six months or whether it be considered as merely filling in the blank without express authority from the makers, the effect was to materially change the note as between the makers and the payee who made the change, and the makers being sureties the change was sufficient to destroy their obligation on the note.

e. That the signature of Lewis to a note was secured by fraud operates to relieve that party; this is a material alteration which by releasing one party releases all other parties. This proposition is fully discussed under Point VI. post.

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### POINT III.

**The answer was sufficient to sustain all the defenses proven.**

The answer contained (a) general denial, (b)

plea of fraud in procuring contract, (c) unauthorized filling of blank in contract.

The trial court held it sufficient to present all those defenses and admitted evidence thereunder; the Supreme Court holding it insufficient denied the defendants the benefit of the following defenses, which it held that though proved were not pleaded:

1. That the contract was materially altered by unauthorized addition of parties.
2. That blanks had been filled in contrary to authority given.
3. That more had been paid than was credited.
4. That collateral had been realized on and changed but not applied.

The Territorial Supreme Court avoids the conclusion that the alteration of the note by adding parties without notice destroyed it and released the makers by saying:

“But such a defense is not even remotely hinted at in the answer.”

“Such a defense” by all rules of pleading is clearly within the issue raised by the general denial.

*Millbank vs. Jones*, 141 N. Y. 340.

The plaintiff counts on a contract made by *nine* persons and payable on demand. The defendants

deny the execution of such a contract. The burden is on the plaintiff to prove the contract alleged and the proof shows that the contract offered is different from the one they signed and was materially altered by the plaintiff after they signed it and without their knowledge or consent.

In order to conclude that the complaint states a cause of action it is necessary to treat the allegations therein "that the defendants are indebted to the plaintiff" and "that there is due and owing the plaintiffs from the defendants" as statements of fact and not conclusions of law, and if these be statements of fact then the answer (6) expressly denied those allegations.

The second sub-division of the answer states:

"They deny that they or any one of them is indebted to the plaintiff on the promissory notes copies of which are set forth," etc.

and

"They deny that there is due or owing to the plaintiff from them or any one of them on said promissory notes any sum of money whatsoever."

Wherever it has been ruled that an allegation of indebtedness as contained in the complaint of this cause is sufficient it has likewise been held that a denial of the indebtedness in the manner alleged is sufficient to put it at issue.

*Wheeler & Wilson Co. vs. Haas*, 6 Ohio N. P. 451.

*Morrow vs. Congan*, 3 Abb. Pr. 329.

*Westlake vs. Moore*, 19 Mo. 556.

*McLaughlin vs. Wheeler*, 1 S. Dak. 497.

*Dallas vs. Ferneau*, 25 Ohio St. 635.

This answer therefore was equivalent to the general issue or the plea of *nil debet* at common law, and threw upon the plaintiff the burden of showing the execution of the note by all the defendants in the form set forth without substantial difference, its delivery to the plaintiff in that form and its non-payment.

The defendants upon their part were entitled to prove any fact going to contradict these necessary proofs of the plaintiff, and if they could show that the note signed by them was a different instrument in a material respect from the one set up in the complaint, and proved by the plaintiff that issue was open to them under the pleadings.

*Speake vs. U. S.*, 9 Cranch. 28-32.

*Milbank vs. Jones*, 141 N. Y. 340.

*Tracy Land Co. vs. Polk Co.*, 131 Ia. 40.

*Puterbaugh Pl. & Pr.* (6th Ed.) 385.

They were likewise authorized to show under this issue an alteration of the instrument made after delivery, the same having the effect of de-

stroying the instrument. This is one of the well recognized defenses provable under general denial.

*Schwartz vs. Oppold*, 74 N. Y. 307.

*F. L. & T. Co. vs. Siefke*, 144 N. Y. 354-8.

*U. P. Co. vs. Campbell*, 35 Neb. 173.

In Millbank vs. Jones, supra the court says:

"Under the general denial the defendant may controvert by evidence anything which the plaintiff is bound to prove in the first instance to make out his cause of action or anything that he is permitted to prove for that purpose under his complaint."

And in F. L. & T. Co. vs. Siefke, 144 N. Y. 354 at 358:

"The burden of proof upon the issue of a material alteration of a written instrument sued upon in its existing conditions presents no anomaly but is governed by the general rule that the party alleging that the instrument sued upon is the act and deed of the defendant must establish it by proof."

"The burden is upon the plaintiff to establish his cause of action when it is in proper form denied by the other party. In actions upon a promissory note this burden is in the first instance discharged by giving evidence tending to show that the note was signed by the defend-

ant \* \* \* but the defendant is not concluded. He may give evidence under a general denial to show that the signature is a forgery or that the note had been materially altered by the plaintiff without his consent or many other things which might be mentioned showing that the plaintiff never had a cause of action."

The issue, if any, tendered by the complaint was the indebtedness of the defendants to the plaintiff. The answer met it in the only way possible by denying the indebtedness. This answer therefore was equivalent to the general issue or the plea of *nil debet* at common law, and threw upon the plaintiff the burden of showing not only the execution of the note by all the defendants in the form set forth without substantial difference, its delivery to the plaintiff in that form and its non-payment; but also of showing an *existing indebtedness* to the plaintiff when the suit was commenced. Under it any fact was competent which showed there was no indebtedness.

*Lent vs. N. Y. & M. R. Co.*, 130 N. Y. 504.

*Fidler vs. Hershey*, 90 Pa. St. 363.

*Anderson vs. Henshaw*, 2 Day 272.

*Stipp vs. Cole*, 1 Ind. 146.

*Clark vs. Mann*, 33 Me. 268.

*Andrews' Stephens Pl. Sec.* 114,

31 Cyc. 691-2.

13 *Id.* 420.

The same reasoning applies to the defense that the note was materially altered by filling in the blanks to make it a demand instead of a time note as was agreed.

*Schwartz vs. Oppold, 74 N. Y. 307.*

In addition to the general denial the answer contained allegations, somewhat inartistic it is true, but ample to apprise the plaintiff that the defense claimed an unauthorized change from a time to a demand note, and the plaintiff took issue on this allegation without moving to strike it out or make it more definite and the trial court rightly treating it as sufficient, admitted the evidence under it.

3. The allegation of non-payment as shown under Point I being necessary, it was put in issue by the answer and proof was admissible thereunder.

4. The application or conversion of the collateral was a matter that took place after issue joined but *not only was the proof not objected to but the fact was stipulated by the parties.* (256.) Where then is the ground for claiming that it could not be considered because not pleaded. That part of the stipulation could have no relevancy to any other issue and the failure to plead it was most effectually waived by the stipulation:

POINT IV.

**Plaintiffs in error were sureties to the bank on the notes for the principal debt of Broyles and any change in their contract, or the slightest fraud in procuring their signatures thereto, released them.**

The answer alleged that the notes were given to cover an antecedent and pre-existing debt then due from Broyles to the plaintiff. This is admitted by the reply. It was further alleged that the defendants received no consideration for signing the note and the plaintiff knew it. This was shown by the undisputed evidence introduced by both parties.

The contract of suretyship has been defined as a contract whereby one person engages to be answerable for the debt, default or miscarriage of another. 27 Enc. 431.

"A surety," says Judge Cooley in Smith v. Sheldon, 24 Am. Rep. at 533, "is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the credit is or is not contracted within the two capacities, as is often the case when notes are given or bonds

taken; the relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities."

The relation between the parties was therefore that of creditor and sureties and they were within the rule stated in the point.

*Putney vs. Schmidt*, 16 N. M. 400.

"A surety," says Justice Swayne in *McGee vs. Manhattan Life Insurance Company*, 92 U. S. 93, "is a favored debtor; his rights are zealously guarded both at law and in equity, and the slightest fraud on the part of the creditor touching the contract, annuls it. Any alteration after it is made, though beneficial to the surety, has the same effect. His contract, exactly as made, is the measure of his liability; and, if the case against him is not clearly within it, he is entitled to go acquit."

In *Griswold vs. Hazard*, 141 U. S. 260, Mr. Justice Bradley quotes with approval, the following from Story's *Equity Jurisprudence*:

" 'The contract of suretysipship,' says Mr. Story, 'imports entire good faith and

confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract.' Again 'If a party taking a guaranty from a surety, conceals from him facts which go to increase his risk and suffers him to enter into the contract under false impressions as to the real state of the facts, such a concealment will amount to a fraud, because the party is bound to make this disclosure.' 1 Story Eq. Jur., Secs. 234, 215. To the same effect are Franklin Bank vs. Cooper, 36 Me. 180, 196; Smith vs. Bank of Scotland, 1 Dow., 272, 292; Ralton vs. Matthews, 10 Clark & F. 934, 943; Small vs. Currie, 2 Drew., 102, 114; Phillips vs. Foxall, L. R., 7 Q. B. 666, 672."

In Davis vs. London Insurance Company, 8 Ch. Div. 469, the court states:

"Very little said which ought not to have been said, and very little not said which ought to have been said, will be sufficient to avoid the contract."

In McMicken vs. Amos Webb, 6 Howard, 292, the court says:

"As against a surety, neither a court

of law nor a court of equity will lend its aid to affect him beyond the plain and necessary import of his undertaking. Equity will not, as against him, assist in completing an imperfect or defective instrument; much less will it add a new term or condition to what he has stipulated. He must be permitted to remain in precisely the situation in which he has placed himself; and it is no justification or excuse with another, for attempting to change his situation, to allege or show that he would be benefited by such change. He is said to possess an interest in the letter of his contract. That (299) this is the doctrine in England we see in the cases of Nisbet v. Smith (2 Bro. Ch. R., 579), Rees v. Berrington (2 Ves., Jun., 540), and Boulbee v. Stubbs, (18 Ves. 20). It is the doctrine of this court, so declared in the case of Miller v. Stewart et al, (9 Wheat. 680). It is probably the doctrine of all the states. (Vide Croughton v. Duvall, 3 Call. 69; Hill v. Bull 1 Gilmer 149). If, then, Webb and Smith were mere sureties in the note declared on, the plaintiff could not, by setting up another contract as formed or as intended to be formed between himself and Ficklin, transfer the responsibility of these sureties to such contract, differing in its terms from that which they had in fact executed."

If a court of law or of equity could not make this change even though it were for the benefit of the surety himself, how can the opposite party make it

without their consent?

In Martin vs. Thomas 65 U. S. 315, this court said:

"In Miller v. Stewart, 9 Wheat. 702, Mr. Justice Story said, 'Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in the obligation he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and an alteration of it is made, it is fatal.'"

In United States vs. Freel 186 U. S. 309 this court says, (316):

"However the proposition that the obligation of a surety does not extend beyond the terms of his undertaking and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the State and Federal Courts establishing it."

In Page vs. Krekey, 137 N. Y. 307 the court says:

"This question seems to have been disposed of in the court below upon the ground that the change was not material but the answer to that is that the defendants obligation is strictissimi juris and he is discharged by any alteration of the contract to which his guarantee applied whether material or not and the courts will not inquire whether it is or is not to his injury." Citing cases.

If this be true in regard to a contract in which the surety is only collaterally interested how much more is it true of the original undertaking such as was presented in Martin vs. Thomas, *supra*?

In Daniel on Negotiable Instruments, (4th Ed.) Sec. 1309, the author says:

"The contract of suretyship is a contract uberrimae fidei. Therefore, where one is induced to become surety for another, as drawer of a bill, or indorser of a note for accommodation, or otherwise, and there is any misrepresentation or fraudulent concealment of a material fact, which, if known, would have induced the drawer, or indorser or other surety not to enter into the contract, his contract is void from the beginning as between the surety and all parties privy to such misrepresentation or concealment."

These and other authorities were adopted and followed by the New Mexico Supreme Court a year after this decision in a controversy closely allied to the case at bar.

*Putney vs. Schmidt, supra.*

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#### POINT V.

**The lower courts erred in ruling that the fraud and alteration in the notes were not available to the defendants because they failed to show themselves injured thereby.**

This result was reached by the following reasoning:

a. The defendants Schmidt, Story and Crossman signed with Broyles a week earlier than the other defendants and the record fails to show any fraud in procuring their signatures or that they knew of any purpose and intent to have the defendant Lewis and the other defendants sign the notes with them.

b. The defendants Brown, Evans and Anderson though induced to sign the notes in the suit by fraud were not injured because they had previously signed other notes of like amount as sureties for Broyles which were to be taken up by the notes in suit.

c. That the release of Lewis one of the makers because his signature had been obtained by fraud

did not injure Schmidt, Story and Crossman because they never knew that Lewis was on or was to go on the notes; and did not release Pratt, Anderson and Evans, because as they owed a debt of like amount it couldn't matter to them what kind of obligation they were sued on.

The above we believe fairly and accurately sets forth the basis upon which the decision of the lower court in this case must rest.

1. As to the first ground it has been covered by Point II supra and the decision is in direct conflict with the express provisions of the Uniform Negotiable Instrument Law, See. 124 and 125 Chap. 83 of the Laws of N. M. for 1907 above quoted.

To say that the earlier signers were not injured by the release of later signers because they did not know of the intention to add the others is to say that no matter how much the payee of a note may change its terms the makers cannot urge the change as a defense because forsooth they did not know when they signed it that the maker intended to change it. Of course, if they did know when he signed it that he intended to change it and made no protest they thereby ratified the change; so they were held no matter which alternative was presented; and the statute is meaningless.

2. But the record demonstrates that the defendants were injured.

To sustain their contention that the defendants

Pratt, Evans and Anderson suffered no injury by being induced to sign the notes for fraud the court below cites a number of authorities, among others Ming vs. Woelfolk, 116 U. S. 599, and the latter case is an excellent illustration of all the authorities cited by the court with the exception of two which will be hereafter noted. They present the case merely that in an action *to recover damages for deceit* the plaintiff must show that he suffered damages or he will not be allowed to recover any.

The court below likewise cites "14 Am. and Eng. Enc. 137 et seq." and that authority well illustrates that the rule announced by the court is confined generally to affirmative actions for damages for deceit and does not apply to defenses. In the volume cited at page 140 the following appears:

"It has been held in a number of cases that to entitle a party to relief because of having been induced by fraud to enter into a contract he need not show that he has actually sustained any pecuniary damages by reason of the fraud, provided he has been otherwise prejudiced.

Thus it has been held that pecuniary damage is not necessary to entitle a person to relief by way of rescission; but that it is enough for him to show that he has been induced by material false and fraudulent representations to enter into a contract which he would not have entered into but for such representations."

*Harlow vs. La Brum*, 151 N. Y. 278.  
*Williams vs. Kerr*, 152 Pa. St. 565.  
*Stewart vs. Lester*, 49 Hun. 63.  
*Mac Laren vs. Cochran*, 44 Minn. 255.  
*Sonnesyn vs. Akin*, 14 N. Dak. 248.  
*Brett vs. Cooney*, 75 Conn. 338.

In the Minnesota case it was said:

"If a party is induced to enter into a contract by fraudulent representations as to a fact which he deems material, and upon which he has a right to rely, he may rescind the contract upon discovery of the fraud, and the party in the wrong should not be heard to say that no real injury can result from the fact misrepresented."

On page 141 of the volume cited the following appears:

"The principle applies when a person who has been induced by fraud to enter into a contract, sets up the fraud to defeat an action thereon."

*Stewart vs. Lester*, 49 Hun. 58.

Another class of cases included within those cited and relied on by the court below are readily distinguishable from the principle here involved upon this ground. In those cases the fraud was in the original transaction resulting in the debt for which the note was given and the defense was failure or want of consideration in the note because of the fraud in the preceding contract. It

is plain that where such an issue was presented unless the fraud in the original contract did damage the maker of the note, his defense of want or *failure of consideration* was not made out.

In the case at bar the fraud was not in any original transaction but in procuring and inducing the signature to the very instrument sued on, and therefore comes squarely within the rule that the instrument being itself tainted with fraud was struck down as soon as it was executed and never had any legal validity at all. It could not therefore support an action.

The same rule as appears by some of the authorities cited in the opinion is applied to a case where suit is brought in equity to rescind a contract, the court holding that unless it appears that the plaintiff was or might be damaged by the contract a court of equity would not concern itself in setting aside a harmless thing because created by fraud.

Thus it has been held that a court of equity will refuse to set aside the release of a cause of action, procured and induced by fraud, upon the ground that if the release were procured by fraud it would be *void*, and therefore no damage to the plaintiff because on proving the fraud it would not stand in the way of his rights.

These authorities are very far from sustaining the proposition that the beneficiary under a fraudulent document may come into court and recover

on that instrument from the defrauded party unless that party could prove to the court that he was not liable to the plaintiff in a like amount under some other preceding contract or indebtedness which the fraudulent instrument was intended to supersede. If this be the rule what becomes of the principle as expressed in The Armistad 15 Peters 518:

“Fraud will vitiate any even the most solemn transactions.”

and consistently followed to this date; or as expressed by Chief Baron Pollock in Rogers vs. Hadley 32 L. J. Exch. 248:

“Fraud cuts down everything.”

What also becomes of the provision of the negotiable instrument laws supra Sec. 55 which provides:

“The title of a person who negotiates an instrument is defective within the meaning of this act, when he obtained the instrument or any signature thereto by fraud.”

In Daniel on Negotiable Instruments 4th Ed. See. 177 the author states:

“That a bill or note \* \* \* was executed under duress or under fraudulent misrepresentations \* \* \* is a good defense as

between the parties privy to it."

And in Joyce on Defenses to Commercial Paper it is stated in Sec. 116:

"Courts will always carefully scrutinize a contract and the surrounding circumstances in connection with its execution or consideration where it is alleged to have been procured by the fraud of the plaintiff or to which he was a party or had notice of. It is a general principle that courts will not allow one who has by fraud or deceit procured the execution of a contract to enforce the same against the one so induced to execute it and thus obtain an advantage or benefit by his fraudulent conduct. These principles apply in the case of commercial paper and in an action between the parties fraud may be shown in defense thereto as it may also against a subsequent holder who is not a bona fide holder or who took the paper with notice of the fraud."

The two cases cited in the opinion below that might seem to lend some support to the decision are:

*Morrison vs. Lobs* 29 Cal. 385.  
*Bank vs. Maxfield* 22 Atl. 479.

The former case the decision refusing to rescind a contract upon the ground of fraud was sufficiently based upon the express finding of the court

that the plaintiff had not tendered back what he had received under the contract. The remaining portion of the opinion is not easy to understand and it is not apparent what principle the court was trying to enunciate. It furnishes no support for the decision here.

The other case from Maine furnishes an excellent illustration of how dangerous it is to select a statement out of an opinion as a basic legal principal without any reference to the facts being considered by the court. There B loaned L \$4,000.00 with which to buy wool, the means used being a draft on B drawn by L. The draft went through the plaintiff bank which accepted B's check, marking the draft paid. B failed that day and the check was returned unpaid. B then returned the draft to the bank and L, without knowledge of what had passed between B and the bank, gave his note to the plaintiff for the debt securing it with a mortgage on the wool. The defendant who had taken the wool from L, disregarding plaintiff's mortgage, being sued in trover, attempted to defend upon the ground among others that the mortgage was fraudulent because secured from L by the false statement that the draft had not been paid. The court held that while technically and in legal effect the draft had been paid by the transaction between B and the bank, nevertheless the result was that the debt evidenced by the draft had immediately passed back to and was

owned by the plaintiff, and it was entirely immaterial whether they owed the draft itself or the debt based upon and which grew out of it.

It will thus be seen that the case at bar instead of the Maine case quoted has the unique distinction of going "to the extent of holding" that an executory contract secured through and based upon fraud may nevertheless be recoverd on in favor of the guilty party, and that too against a surety.

3. How can it be said that his co-sureties or signers on the note were not injured by the release of Lewis?

Had he not signed the note with them? Was he not a maker and as such liable to bear his proportionate burden or contribution to its payment; and when he was released did not the greater burden porportionately fall on the others? Is this no injury?

We confess ourselves unable to understand the logic and reasoning of the opinion upon this point.

4. For like reasons we are unable to understand the contention that the instrument was not materially altered as against the earlier signers by the addition of the later ones. Suppose one or two of the later signers were insolvent or beyond the jurisdiction of the court; before they signed, each surety in an action at law, could recover one-fourth of the amount paid by him from each of his co-sureties. After the others were added he could only recover one-eighth from each

in a like action; and if two were insolvent their shares would be lost to him entirely.

"As a general rule the surety who has paid the debt can at law only recover from his solvent co-sureties an aliquot part of the debt, based on the whole number of sureties solvent and insolvent."

*Brant on Suretyship, Sec. 288.*

and see cases collected in  
32 Cyc. 286, note 24.

It is true that the rule in equity is different and that by suing in equity he could recover his proportionate share from each of the sureties, excluding insolvent ones, but by so doing he must give up his right to a trial by jury and other incident rights and must also assume the burden in advance of ascertaining which of his co-sureties are insolvent; and assumes this burden as to parties whom he had no voice in taking into the enforced partnership. How can it be said that this is no injury?

POINT VI.

**It was error to refuse to submit to the jury the question as to whether the signature of Lewis was not obtained by fraud.**

It is conceded that under the New Mexico statute the plaintiff may sue less than all the joint parties to a note; or having sued them all may dismiss as to some without releasing the others.

That is not the point involved. The question here was the right of the sureties to prove that one of their number had been released because secured through fraud.

Sec. 55 of the negotiable instrument law above quoted provides:

“The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force, fear or other unlawful means or for an illegal consideration or when he negotiates it, breach of faith, or any such circumstances as amount to a fraud.”

The court below said “The only cases construing this section so far as cited in the briefs and so far as disclosed in Brennan’s Negotiable Instrument Law (edition of 1911) are from Wisconsin, being the cases of Hodge v. Smith 130 Wis. 326, 110 N. W. 192 and Aukland v. Arnold, 131 Wis. 64,

11 N. W. 212. In both of these cases it is held that where one of the signatures is obtained by fraud it is a defense available to all signers. In the latter case after quoting the Wisconsin section which is embodied in precisely the same language that is contained in our Section 55 it is said:

"The first clause of this section was considered and interpreted in the recent case of Hodge v. Smith 130 Wis. 326, 110 N. W. 192. It was there held that the title of a person who negotiates commercial paper is defective when he has obtained any signature thereto by fraud, and that if the parties so defrauded be relieved from liability thereon, then such fraud makes such paper voidable by all other persons who signed it, though they did not participate in and were ignorant of such fraudulent conduct at the time they signed it. This conclusion was reached upon the ground that, when several persons assumed such an obligation it is material and important that all who join as makers should share equally in bearing the burden of its payment, and if through the fraud of the person holding it, such equality of burden is distributed and the burden increased as to some of the persons signing it, such fraud renders the title defective as to all of the persons who signed it."

It will thus be seen that the court adopts and approves the construction placed upon the statute by the Wisconsin court but holds it inapplicable.

able for the reasons above given that as to the earlier signers they did not know that Lewis was on the note apparently holding that that fact would excuse Lewis from contributing with them to the payment of the note and as to the later signers because they were liable for a debt of the same amount and therefore were in no worse position than before Lewis signed and that the net result of releasing him left them in no worse position than they were at the outset.

We have already seen that these parties were sureties for Broyles.

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#### POINT VII.

**The \$1000 check and the proceeds realized from the collateral described in the stipulation Exhibit 1 should have been credited on the notes.**

During the progress of the trial there was a stipulation as to certain facts signed between counsel which was made a part of the record, (256) and which, among other things, recited that on May 27th, 1908, plaintiff recovered judgment against the New Golden Bell Mining Company for the sum of \$5,938.47 upon a promissory note of said company originally payable to defendant Broyles, and theretofore, to-wit, on November 8th, 1908, endorsed to plaintiff bank by defendant Broyles and deposited by him with said bank together with other notes likewise payable to defendant Bro-

les as collateral to his indebtedness; that thereafter, to-wit, on June . . ., 1908, the judgment against the New Golden Bell Mining Company was satisfied of record by plaintiff bank upon the delivery to said bank by said New Golden Bell Mining Company of certain other securities, and that plaintiff up to the date of said stipulation, had realized \$772.16 cash on these securities.

Thereupon, defendants' counsel moved the court to instruct the jury to credit upon the notes sued on, not only the amount of \$1,500 alleged in the complaint to have been credited upon the five thousand dollar note, but also the amount of the judgment on the note above referred to; and also moved that the jury be further instructed to give defendants credit for the further sum of \$35, \$107.25, \$11.97, and \$3.03, shown by the proof to have been collected by plaintiff upon other of the collateral which had been deposited with plaintiff by defendant Broyles for the purpose aforesaid. The court denied all said motions and instructed the jury to find a verdict for the full amount of the notes and interest less the \$1,500 payment admitted.

The evidence of all the defendants who talked with Johnson was to the effect that he told them that the bank held ample collateral as security for these notes, and the witness Broyles testified that Johnson told Evans what it was, enumerating all the collateral then held by the bank, including that

hereinafter referred to.

This conversation is nowhere denied by Johnson.

It is now claimed by the plaintiff that they may apply the proceeds of this collateral upon other indebtedness of Broyles.

We submit that by representing to the defendants that this collateral was held to secure the notes in question, the plaintiff is estopped to deny that all sums realized therefrom should be applied on the notes.

It is an elementary principle that where one person has intentionally led another to believe that a certain state of facts exist, and the other has rightfully acted on this belief, so that he will be prejudiced the person so representing is estopped to deny the existence of such facts.

*11 Am. & Eng. Enc. 421.*

Under the doctrine of estoppel above referred to, these defendants were entitled to have credited upon the notes, the proceeds realized from this collateral, and it was error for the court to refuse so to rule.

It is also submitted that the defendants are entitled to have credited on their notes the full amount of the judgment recovered by the bank against the Golden Bell Mining Company on this collateral, and which judgment was afterwards

satisfied and other securities taken in payment thereof by the plaintiff.

It is a general rule that where a chose in action is pledged as collateral security, the pledgee is not authorized to accept anything but full payment of the collateral, and cannot enter into a compromise with the debtor the claim against whom has been assigned.

*Colebrook on Col.* Sec. 96.

*Story on Bailments* Sec. 321. *And see authorities collated in.*

*22 Am. & Eng. Enc.* 903.

Where property is placed in the hands of a debtor as collateral the amount thereof, if realized, lost or otherwise made applicable, must be applied upon the debt as against a person who is actually a surety, though appearing on the instrument as principal debtor.

*Grow vs. Garlock*, 97 N. Y. 81.

*Dibble vs. Richards*, 171 N. Y. 135.

*Brown vs. Bank*, 112 Fed. 901.

That is the situation presented by this case, and the sureties were entitled to have the amount of the judgment, to-wit, \$5,938.47, applied upon the notes.

Where a creditor holds securities for the prin-

cipal indebtedness, and he surrenders, loses, or otherwise disposes of such securities, the surety upon the indebtedness is entitled to have the amount of such security applied upon the debt and he is released from liability pro tanto.

*The defendants are also entitled to have the further sum of \$1,000.00 testified to by Johnson, credited upon the notes.*

The witness Johnson testified that the only credit or endorsement on the notes was the sum of \$1500. He does not claim to be able to say positively that nothing more has been paid. (27-8, 168-9.)

On cross examination, however, he admits that on April 16th, the same day of the \$1,500 payment, his bank received from Broyles a further check of \$1,000 which Mr. Johnson at first said was in payment of interest on the \$25,000 notes (174-5). Asked if he had taken interest in advance on demand notes became confused and said he did not know what it was to apply on, had not the record with him, and testified that it was to apply on the notes because of a pencil memoranda to that effect written on the check, by whom he did not know. He admitted, however, that at that time the notes passed through his hands (176-7). The statement annexed to the stipulation (257-8) shows that on April 16th, when that check was given, Broyles owed the bank nothing other than on these notes and the check is not charged to his account until May 20th.

It is evident that the bank received the \$1,000 from Broyles and as the notes in suit were his only indebtedness to the bank at the time, it is evident that the \$1,000 should be also applied thereon.

If one party owes another a debt and pays him money, the presumption of law is, that the money was intended to apply on the debt.

*Hansen vs. Kirthy*, 11 Iowa, 565.

*Daugherty vs. Deeney*, 45 Iowa, 443.

*Succession of Hymel*, (La. An.) 19 So. 742.

We submit that this payment should also apply on the note, and it was error for the court to direct a verdict without applying it.

---

#### POINT VIII.

**No question as to the sufficiency of the defendants' answer to support any defense established by the evidence is available to support the judgment.**

The trial court held the answer sufficient and admitted the evidence under it, and the exceptions taken to those rulings by plaintiff below cannot be availed of.

In most, if not practically all jurisdictions, in making up a record upon appeal on questions of law, all exceptions and objections of the success-

ful party below, are not made a part of the return. The appellate court searches the record for errors, if any, committed against the appellant, in the light of what took place upon the trial. It will never consider errors committed against the successful party in sustaining a judgment, unless in some extreme case where it appears that the error was of such a nature that it would have been impossible for the losing party to sustain his claim or defense before the trial court if the question had been rightly decided.

For the purpose of this appeal, all rulings of the trial judge in favor of the defendants below must be taken as the law of the case; and the rulings of the court below against the defendants must be examined and decided in the light of his rulings in their favor, and treating those favorable rulings as being correct in point of law. This proposition would seem to be elementary, and it is believed that no decision to the contrary can be found in any appellate court; at least, I have been unable to find any in the limited time at my disposal. Indeed the proposition has seldom even been suggested. In the three jurisdictions where I have found the question considered, the first, (*California*), the Supreme Court in *Morgan vs. Southern Pac. Ry Co.*, reported in 17 L. R. A., 71, brushed it aside with a remark, as unworthy of consideration. In that case, as in this, the plaintiff succeeded and endeavored to sustain his verdict on appeal, by contending that the defense asserted was

not available under the answer. It appears from the respondent's points in that case that such objection had been taken upon the trial, and overruled. There, as here, it was substantially the entire contention of the respondent in the Appellate Court, and it was disposed of by the Supreme Court in this remark at the end of a somewhat lengthy opinion upon other subjects:

"There is nothing in the point made by respondent that the answer was not verified. Upon that point the court ruled in favor of the defendant, and plaintiff is not appealing."

That case would seem to present exactly the situation now before this court.

In *Maryland Insurance Co. vs. Wood*, 6 Cranch, 29, where the judgment of the lower court was reversed, Chief Justice Marshall says:

"The first exception having been taken by the party who prevailed in the cause, is passed over without consideration."

The question, however, was given more extended consideration and the reasons for the rule explained by the New York Court of Appeals in *Wrangler vs. Swift*, 90 N. Y., 38. In that case Judge Danforth, writing the opinion of the court, says:

"It is enough now to say that the plain-

tiff cannot sustain the verdict upon the ground taken from him by the trial judge. The ruling then made became the law of the case. Elsie vs. Metcalf, 1 Denio, 323; Stanton vs. Wetherwax, 16 Barb. 259; Roger vs. Murray, 3 Bosw., 357; Currie vs. Crowells, 6 Id., 460. And we cannot assume that the trial judge departed from it. Had the ruling been otherwise, it may well be that the defendant might have prevailed by opposing evidence and upon grounds which do not now appear."

The cases cited by the learned judge in this point fully sustain the ruling and show their application to a statement of facts like those at bar.

In this case, if we may credit the remarkable record returned, the plaintiff challenged practically every question asked by the defendants' counsel during the entire trial, both upon direct and cross-examination as being not in conformity to the pleadings; and the answer being given, moved to strike out the answer upon the same grounds, so that approximately one thousand times in the course of this trial, embracing every possible feature of the defense, the trial justice was required to rule upon the proposition as to whether it was competent under the pleadings, and upon each of the thousand times the trial justice ruled that the evidence was competent and within the issues raised by the answer. With something like one thousand rulings of the trial judge in their favor, embracing every point in dispute, the defendants

were fully justified in believing their answer to be sufficient. In the face of these rulings, there was neither occasion nor necessity to ask any amendment and it would be a queer sort of justice that would forfeit their substantial rights because they failed to do so.

The question as to sufficiency of the answer was first raised by the objection on page 56 of the record, when the defendants sought to prove the representations made to them by Johnson which induced them to sign the notes. The jury was then withdrawn, the question argued, and the objection overruled. The exact scope of the ruling does not there appear but later an answer of the witness was given, tending to show that Mr. Johnson had stated to the defendants that their signatures were desired merely to satisfy the Board of Directors of the Bank and not with the idea that they were necessary. In passing on a motion to strike out that part of the answer, the trial court said, referring to the former ruling, (Tr. 59) :

"I indicated in the room the scope to which your defense would be limited. This is without that scope. Absolutely immaterial what they were going to do with these notes; the question is, how did they get these signatures. My proposition is this, in this case. There is an allegation of three present, existing facts, which facts you claim induced your men to sign these notes. Now that is all you can prove, are those facts."

That this limitation had no reference to the pleadings but to the general incompetency the court made clear by his statements on pages 68 and 69, and by subsequent rulings.

The three facts which the court had in mind, as appears in the subsequent course of the record, were the representations, first, that Broyles was solvent; second, that the note was to be for six months; and third, that the bank had ample collateral. It is apparent, therefore, that the defendants had no reason to believe that their answer was in any manner insufficient. Had the court ruled differently, assuming the answer to have been insufficient, it would have become incumbent on the defendants to request permission to amend, and failing to do so they would then have to stand upon the proposition of the sufficiency of the answer. By the ruling of the court they were lulled into security and prevented from making any application to amend; and for this Court now to base any decision upon the proposition of insufficiency of the answer to sustain the defense proved, at a time when they have no opportunity to protect themselves by amendment, if the answer be insufficient, would be to perpetuate a grave injustice and an action for which, we submit, no authority can be found.

We have not overlooked the fact that in moving for the direction of a verdict in his favor, the plaintiff, stated as one of the grounds, that the de-

fense proven was not the one pleaded. But as the court had already expressly overruled that contention one thousand times, it will hardly be presumed that the court placed his final decision on that ground, in the absence of any intimation to that effect. That such was not his ruling, is conclusively shown by the fact that *under the same answer* he held the defendant Lewis entitled to go to the jury on all the issues.

The learned trial judge gave no reason for his decision and we are left to conjecture as to his reasons. This alone should reverse this case. Certainly no court will assume speculative reasons to sustain the ruling.

*Rayl vs. Hammond*, 95 Mich., 22; 54 N.W., 696.

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#### POINT IX.

**The Judgment should be reversed with costs and the cause remanded to the Supreme Court of New Mexico with Directions to Reverse the Judgment of the District Court and award a new trial.**

O. N. MARRON,  
FRANCIS E. WOOD,  
Attorneys for Plaintiffs in Error.

3  
U.S. DISTRICT COURT, N. D.  
NEW MEXICO

MAR 14 1914

JAMES D. MAHER  
CLERK

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## Brief of Defendant in Error.

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### IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1913

No. 281

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SCHMIDT AND STORY, FRANZ SCHMIDT,  
CHARLES H. STORY, CHARLES M.  
CROSSMAN, ET AL., Plaintiffs in  
Error.

vs.

THE BANK OF COMMERCE, Defendant  
in Error.

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Appeal From the Supreme Court of New Mexico.

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ALBERT G. ADAMS, CLERK OF THE COURT, NEW MEXICO

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IN THE SUPREME COURT OF THE UNITED  
STATES.

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October Term, 1913.

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No. 281.

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SCHMIDT AND STORY, FRANZ SCHMIDT,  
CHARLES H. STORY, CHARLES M.  
CROSSMAN, ET AL., *Plaintiffs in  
Error.*

vs.

THE BANK OF COMMERCE, *Defendant  
in Error.*

---

BRIEF FOR PLAINTIFFS.

In error to the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the Third Judicial District Court in that Territory entered upon a verdict directed in favor of the plaintiff in an action on promissory notes.

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STATEMENT.

We are unable to accept the statement of plaintiffs in error as a complete or entirely accurate statement of what was shown by the evidence of-

(2)

ferred at the trial, and therefore submit this additional statement in that respect.

The Bank of Commerce, defendant in error here, plaintiff below, was a banking corporation, carrying on business in Albuquerque, New Mexico. J. N. Broyles, one of the original defendants, was a private banker at San Marcial, New Mexico, and was also engaged there in other lines of business. The plaintiffs in error, defendants below, Schmidt & Story, Franz Schmidt and Charles M. Story, Charles M. Crossman, E. W. Brown, H. Evans and G. P. Anderson, otherwise known as Pratt, resided in the vicinity of San Marcial, and most of them were customers of Broyles' bank, at and before the giving of the notes in question, part of the plaintiffs in error were under obligations to Broyles, he having endorsed their paper. Record, pp. 12-13; Record, pp. 132-133; Record, p. 162. Defendant in error had also, for some time previously, been Broyles' principal banking correspondent at Albuquerque. On November 8th, Broyles was indebted to defendant in error, in the sum of \$25,000.00, evidenced by certain promissory notes signed by himself and others, and was further indebted on over-draft in the sum of \$5789.48; on or about the 20th of that month, Broyles sent to defendant in error, in renewal of his notes, which appear to have matured on November 8th, three notes of the latter date, signed by himself, Brown, Evans and Pratt, two of these being for \$10,000.00 each, and the third for \$5000.00. Record, pp. 67, 68, 256. At

the time of sending these renewal notes, Broyles also deposited with the defendant in error, as collateral, the notes of certain third parties, endorsed by him. But there is no evidence to show that the notes of these third parties were to be held as collateral to the notes signed by Brown, Pratt and Evans. Other notes and securities appear to have been deposited in the regular course of business by Broyles with defendant in error, from time to time, but without any agreement as to what accounts they were to secure. On February 28th, 1908, Broyles wrote defendant in error, requesting it to discount all the notes held by it as collateral, to balance up his over-drafts, and to credit the balance on his \$25,000.00 notes; his over-draft, at that time, amounting to a little over \$10,316.79. On March 11th, 1908, defendant in error, in partial compliance with his request, discounted a number of notes so held as collateral, amounting to \$9997.14, and credited the amount on the over-draft, leaving Mr. Broyles still over-drawn, to the extent of \$319.65. Record, pp. 266, 263, 264. Among the notes so discounted, were those of Crossman, Anderson and Evans. A note of Brown was also among the collateral, but was not discounted. Record pp. 263, 262. The notes given by Broyles, Brown, Pratt, Anderson and Evans, in November, matured on or about April 9th, 1908, and defendant in error, for the purpose of obtaining renewals, shortly before that date sent to Broyles three new notes, two being for \$10,000.00 each, and one

(4)

for \$5000.00; the \$5000.00 note and one of the \$10,000.00 notes only being involved in this suit. Record, pp. 3-4. The evidence was conflicting as to whether the date and words, "on demand," were filled in in these notes at the time they were sent. Defendant in error requested Broyles, in addition to his own signature, to obtain the signatures of his co-makers on the November notes, and also of a number of others of his customers. Broyles, in addition to his own, obtained the signatures of Pratt, Brown, Franz Schmidt and Story and Charles M. Crossman, Brown signing first. Record, p. 148. There is no evidence whatever to show that anything was said between Broyles and these signers at that time as to who was to go on these notes. Apparently, each of these parties signed separately, upon the request of Mr. Broyles, leaving the note in his possession. No officer of the defendant in error was present and it is not claimed that up to that time, any representations as to Broyles' solvency, or in regard to any other matter, were made by any of the officers of defendant in error. Plaintiff in error, at the trial, however, offered to prove by Crossman that Broyles made certain representations to him in regard to these notes, on the theory that Broyles, in procuring these signatures, was the agent for defendant in error, owing to the fact that defendant in error had requested him to obtain signatures to these renewals. This offer was denied by the court. Record, pp. 153-154. After signing the notes,

Brown states that he went to Albuquerque, and had a conversation with Mr. Strickler, the Vice-President and Cashier of the defendant in error, with reference to Mr. Broyles' financial responsibility. That Mr. Strickler stated that Broyles was the strongest man in that country, and that he, Brown, agreed with him, because he thought so himself. Record, p. 149 to 151.

After Broyles had obtained the signatures of Brown, Crossman and Schmidt and Story, he sent or took the notes to the defendant in error at Albuquerque; but defendant in error was unwilling to receive them without the signatures of Anderson and Evans, who had signed the November notes, and accordingly, Mr. Johnson, its assistant cashier, took the notes back to Mr. Broyles at San Marcial for the purpose of obtaining their signatures, and if possible, the signatures of other parties, and Broyles called in and obtained the signatures of Anderson and Evans, and also of Charles Lewis. Each of these signatures was obtained separately, in the absence of the others, and there is not a word of evidence as to any agreement or understanding as to whose signatures were to be on the note, or how many signatures were to be obtained. Like those who signed the note in the first place, these parties signed separately and left the note in Mr. Broyles' possession, to be completed. Mr. Johnson was present when these last three signatures were obtained, and it was, as to these three, that evidence was offered as to certain statements

made by him in regard to Broyles' financial standing, etc., which, it is claimed, induced these three parties to sign the notes. Mr. Johnson was, however, an entire stranger to these parties, and denied that he made any such representations. After these signatures had been obtained, the new notes were delivered and the old notes surrendered to Broyles and cancelled. The notes were not completed and delivered until April 9, 1908.

The evidence also shows that at the time of the signing of these notes defendant in error still had in its possession, as collateral, for Broyles' indebtedness to it, some of the notes which had been delivered to it in November previous, and which it had not discounted, and possibly, also, some additional notes; but the evidence does not show that any of this collateral was held as security for the notes in this suit, or that there was ever any agreement that they should be so held or applied. At the date of the commencement of this suit, in addition to the note sued on herein, Broyles was indebted to the defendant in error on the second note for \$10,000.00, and also on an overdraft of \$472.48; and was liable as endorser to the extent of over \$9,000.00 on notes discounted by the defendant in error. Record, pp. 263-264.

A mere reference to the stipulation will show that the facts stipulated between the counsel in regard to collateral was made subject to the competency and relevancy of the testimony. Record, pp. 256-257. And when the witnesses were inter-

rogated the same objections were continued through the record. Record, pp. 65, 66, 67 and 68.

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#### POINT NO. 1.

BOTH PARTIES ASKING FOR PEREMPTORY INSTRUCTIONS IT WAS NECESSARILY A REQUEST THAT THE COURT FIND THE FACTS, AND THE DEFENDANTS ARE THEREFORE CONCLUDED BY THE FINDINGS MADE.

At the very outset of this case it is necessary that the scope of the inquiry be definitely determined and accurately fixed upon the requested instructions asked for the plaintiff and the defendants.

At the close of the testimony the defendant in error moved the court for an instruction for the plaintiff, and the plaintiffs in error, except the defendant Broyles, moved for an instrutcion for the defendants.

In order that the court may be fully advised as to the steps which were actually taken, we herein re-state that part of the record:

"Comes the plaintiff, by Dougherty and Griffith, and James G. Fitch, Esquire, its attorneys, and comes the defendant, by Fall, Holt and Sutherland, their counsel, and all the evidence being heard, the plaintiff moves the court to instruct the jury to return a verdict for the plaintiff, and the defendants move the court to return a verdict for the defend-

ants, except J. N. Broyles; and the said motion of defendants is denied, and the motion of the plaintiffs is sustained, as to all of the defendants, except Charles Lewis, and is denied as to said Lewis; whereupon plaintiff says that it will not further prosecute this suit against the said Charles Lewis; whereupon it is ordered by the court that the said cause, and the same is hereby dismissed as to the said Charles Lewis. To all of which orders and rulings of the court the said defendants except.”

*Record, page 13.*

The stenographer's notes show the following:

“Plaintiff moves after the close of all the evidence in the case for an instruction for the plaintiff, because the defense as offered is not sufficient; because the defense is not admissible under the state of the pleadings; does not conform thereto, and the issues which have been raised thereby are not the issues which have been raised by the pleadings; and also for other reasons.”

*Record, page 253.*

“Counsel for defendants moves the court to instruct the jury to return a verdict for the defendants in this case, for the reason that it appears from the uncontradicted evidence in this case that there are various numbers of the defendants, particularly E. W. Brown, Evans and Anderson, signed this note in blank, with the understanding of the party ob-

taining the signatures, and the bank itself, that the notes were to run from four to six months, and that the notes cannot be recovered upon unless they were filled in in accordance with the instructions of the parties signing them, under section 14, of chapter 83, Acts of the Legislative Assembly of 1907."

By the Court: "Motion to instruct for the plaintiff against all of the defendants, is sustained, except as against the defendant Lewis; and the motion to instruct for the defendants is denied."

Defendants except.

*Record, page 253.*

By the plaintiff: "As to the defendant Lewis, plaintiff desires to take a non-suit."

By the Court: "It is allowed."

By the defendants: "Exception is noted by defendant Lewis, and the other defendants, to the ruling of the court granting the non-suit."

*Record, page 253.*

By defendants:

"Defendant Lewis, and his co-defendants object to the granting of a motion in non-suit and insist that under the ruling of the court sustaining partly the motion made by counsel for the plaintiff in this case and overruling it as to Lewis, that not only Lewis, but his co-defendants, are entitled to a decision at the hands of the jury in this case, *but to an instruction by the court to the jury to re-*

*turn for the defendant Lewis."*

Objection overruled.

*Record, pages 253-254.*

"The defendants, Schmidt and Story, Franz Schmidt, Charles H. Story, and Charles M. Crossman, Edward W. Brown, William E. Pratt and Henry Lewis again move the court to instruct the jury to return a verdict for defendants, and particularly for the defendants named in this case, because it appears by the motion for non-suit as to defendant Lewis, that plaintiff elects to discharge defendant Lewis from obligation upon the paper sued upon and for the reason that such discharge is a discharge in law against all the other defendants, and that they are entitled to an instruction from the court to that effect."

"Motion for an instruction is denied."

*Record, page 254.*

"The defendants move the court to instruct the jury that in the event, under the instruction of the court they find the verdict for the plaintiff in this case, they shall find credits upon these notes sued upon, not only to the amount of \$1,500 payments made, but also to entire amount of the Golden Bell note, which has been sued upon by plaintiff and judgment obtained and satisfaction acknowledged by plaintiff in the sum of fifty-nine hundred thirty-eight dollars and forty-seven cents and also in the sums of thirty-five dollars, one hundred and seven dollars and twenty-five cents, eleven dollars and ninety-seven cents, and three dollars and three

(11)

cents, which it is claimed by defendants are shown to have been paid to the plaintiff for the defendant's benefit."

"Motion denied."

*Record, page 254.*

"Defendants further move the court to instruct the jury that the plaintiff has no right to apply the \$9,997, as shown to have been a credit, upon a certain account of Broyles to such account, exclusive of the notes, and that by their verdict they shall give credit to the defendants for all such amount, that is to say, \$9,997, or the proportionate amount of such sum which the sum of \$10,000 overdraft bears to the amount of \$25,000, as evidenced by promissory notes in this case."

"Motion denied."

*Record, page 254.*

"Counsel for defendants asks the court to instruct the official stenographer to have her record show that the election of plaintiff to take a non-suit as to the defendant Lewis was not made until after the ruling of the court upon plaintiff's motion for an instruction to the jury."

By the Court: "It will be done."

*Record, page 254.*

"The defendants move the court to instruct the jury to return a verdict for the defendants in this case, for the reason that it appearing that there was collateral held by the bank for these notes, and it appearing from the record that the bank knew that the defendants were simp-

ly accommodation makers; that no demand was made upon the defendants for payment of this note by the plaintiff, and that the defendants have had no opportunity to pay the same off and acquire the collateral."

"Motion denied."

*Record, pages 254-255.*

It will be seen from reading the above that all of the instructions which were asked by both plaintiff in error and the defendants in error were peremptory; both conceiving that the case should be decided upon questions of law, and neither asking for any instructions requiring submission to the jury on controverted facts.

The legal result was that both parties admitted that there was no disputed question of fact which could operate to deflect or control the questions of law, and was necessarily a request that the court find the facts, and the parties are concluded by the findings made, upon which the resulting question of law was given. The findings having been submitted to the court below, this court is limited in reviewing its action and the consideration of its correctness of the findings of law.

*Beutell v. Magone*, 157 U. S. 154.

*Lehen v. Dickson*, 148 U. S. 71.

*Runkle v. Burnham*, 153 U. S. 216.

In the first case referred to the court uses the following language:

"As, however, both parties ask the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the findings made by the court, upon which the resulting instruction of law was given. The facts having thus been submitted to the court, we are limited in reviewing its action, to the consideration of the correctness of the finding of the law, and must affirm if there be any evidence in support thereof."

The doctrine as announced has never been modified, overruled or changed, but has been affirmed and explained by a recent case in this Court; explained to this extent only: That where both parties submit the case implicitly to the court, by asking for peremptory instructions, still if the same be overruled, the party against whom the ruling is made can then ask special instructions embodying disputed questions of fact for submission to the jury.

In this case it was, among other things, stated:

"It was settled in Beuttell v. Magone, *supra*, that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed, and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the

view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony, are divergent."

*Empire State Mutual Co. v. The Atchison R. R. Co.*, 210 U. S. 1.

The doctrine is sustained by a line of federal cases decided both previous and subsequent to its announcement by this Court. A few of the cases are:

*Bankers' Mutual Casualty Co. v. State Bank of Goffs*, 150 Fed. 78;

*City of Defiance v. McGonigale*, 150 Fed. 689;

*Insurance Co. v. Wisconsin Central Ry.*, 134 Fed. 794;

*Phoenix Insurance Co. v. Kerr*, 129 Fed. 723.

The cases, both federal and state, could be multiplied almost indefinitely.

In the New York case referred to, *Empire State Mutual Co. v. The Atchison Railway Co. (Supra)*, it is held:

"Neither party asked to go to the jury upon any question of fact, and if, therefore, the evidence presented any such

question, the court was authorized, by the mode in which the case was tried, to find thereon, and if there was evidence to sustain the finding, it is conclusive upon the parties on this appeal. By requesting the court to determine the case as one of law, the party waived his right, if any, to go to the jury upon questions of fact, and submitted all questions involved to the determination of the court."

*Kirtz v. Peck*, 113 N. Y. 226.

This is the law, even where the trial judge states that he will hold the facts to be established in accordance with the theory of the party against whom the verdict was directed.

*Sutter v. Vandevere*, 122 N. Y. 652.

See also:

*Stanford v. McGill*, 6 N. D. 536 (38 L. R. A. 760 and cases cited).

As is shown by the reading of the request made by the defendants in this case, they were all for peremptory instructions. First, as to the entire case; second, for peremptory instructions as to the particular credits, and third, concluding request for peremptory instructions.

Therefore, we respectfully submit that the only inquiry in this case is as to whether or not there was any evidence introduced which tended to support the inferences of law drawn by the trial judge. A reading of the testimony clearly shows

that while Lewis, Evans and Pratt (alias Anderson) claimed that some representations were made to them, the nature of which we have treated under other assignments of error, the fact that these representations were made is distinctly contradicted and denied by the testimony of the defendant in error. The witness Johnson, who testified in behalf of the defendant in error, testified that he had no conversation with these people until after the notes were signed, and that he made no representations whatsoever prior to the signing of the notes. It will also be apparent from a reading of the transcript that there was absolutely no claim of any misrepresentation made to any of the other parties; therefore even if this court should hold that there was a disputed question of fact, the request for peremptory instructions by both plaintiff and defendant was necessarily a request that the court find the facts, and the court necessarily having found those facts in favor of defendant in error there is nothing before this court to determine except as to whether or not they were based upon evidence.

The Supreme Court of the Territory thought that the language used by defendant's counsel, after their first request for a peremptory instruction had been denied, was equivalent to a demand for a jury. But the language used does not seem to be susceptible of any such construction. It starts with an objection to the granting of a non-suit as to the defendant Lewis, and this

was the only thing upon which the ruling of the trial court was invoked or obtained. The language following the objection to the non-suit is not clear, but it seems to be merely a statement of counsel's position, rather than a request for any action on the part of the court. Nor was counsel fortunate in making clear what his position was; for how "under the ruling of the court sustaining partly the motion made by counsel for the plaintiff in this case and overruling it as to Lewis;" could it be insisted that his co-defendants were entitled to a submission of the case to a jury; or how could it be contended as to Lewis, that he was entitled to have the case both submitted to the jury and to a peremptory instruction in its favor. Certainly the language is far from being an appropriate request for a submission of the case to the jury. And that neither counsel or the court understood it as containing and such request, is apparent from what follows. The court did the only thing it was called upon to do—overruled the objection to the non-suit; whereupon counsel again moved for a peremptory instruction for defendants, then for two peremptory instructions as to certain credits to be allowed defendants; and finally, for the third time, a peremptory instruction for defendants. *We feel that this is conclusive of this case, and it is not necessary for this court to go beyond this point*, but in case the court should not agree with us and in order that it may be fully advised

we have briefed specifically the other assignments.

POINT II.

THE COURT DID NOT ERR IN GIVING INSTRUCTION IN FAVOR OF DEFENDANT IN ERROR AND DENYING INSTRUCTION IN FAVOR OF PLAINTIFFS IN ERROR.

UNDER PLEADINGS, PROOF NOT PERMISSIBLE.

(1) False and fraudulent representations.

Under the pleadings the court could not have done otherwise than direct a verdict for defendant in error. We will first consider the answer of the defendants with relation to the so-called false and fraudulent representations. The defendants allege:

“That these defendants’ signatures to said notes were obtained by virtue of certain false and fraudulent representations made to these defendants by the said Broyles and plaintiff.”

*Record, page 7.*

And they in substance are to the following effect:

- (1) That the defendant Broyles was solvent and amply able to pay off and discharge all of his just debts and liabilities.
- (2) That defendants’ signatures to

said notes were desired by the said defendant Broyles and plaintiff merely and purely as accommodation makers in order to enable the plaintiff to make a proper showing before its Board of Directors, and the Territorial Bank Examiner, in case he should visit the said bank for the purpose of making an official examination.

(3) That said notes were amply secured by collateral deposited by the defendant Broyles with plaintiff's bank.

(4) That defendant Broyles could and would take care of said notes and defendants would never hear of them again.

(5) That plaintiff knew defendant Broyles to be financially sound.

(6) That plaintiff proposed to and would carry defendant Broyles as long as he desired them to do so or as might be necessary.

(7) That at the time when defendants' signatures were so obtained, the time when said notes were to be payable was in blank, and that the defendants were further falsely and fraudulently informed by defendant Broyles and plaintiff in substance and to the effect that defendant Broyles was to be given such time within which to pay the indebtedness evidenced by said notes as he might require and were left in ignorance of the fact that the defendant Broyles in filling in said notes made them payable on demand.

It will be noticed that the parts of the answers which, for convenience, we have designated Nos.

2, 4 and 6, *supra*, are attempts to contradict the express terms of the promissory notes.

It is so elementary that you cannot contradict the terms of a promissory note by contemporaneous parol agreement that it seems hardly necessary to cite authorities. However, a long line of cases covering in some instances almost similar conditions, are cited in the 20th Century Digest, Sec. 1802-1804.

"The binding effect of a note cannot be affected by contemporaneous parol agreement that it need not be paid."

*Payne v. Mutual Life Insurance Co.,*  
141 Fed., 339-345.

*Brown v. Wiley*, 20 How. 442.  
*Martin v. Cole*, 104 U. S. 30.

Considering the allegations which we have designated as Nos. 1, 3, 5 and 7, *supra*, the plaintiffs in error have attempted to plead false and fraudulent representations, and they have failed in every particular. When they offered this proof the objection was made, and it was carried through the entire record, that the matters which they were attempting to prove were not in issue; not in accordance with the pleadings, and not permissible thereunder, so that they had ample notice of the deficiency of their pleadings from the very beginning of the trial.

Analyzing these attempted allegations of false and fraudulent representations, it will be noticed,

except by general allegations of falsity, that they do not show that the misrepresentations were false, or if false, in what part; they do not charge that the defendant Broyles was other than solvent, or that he was not amply able to pay off and discharge his just debts and liabilities at the time that their signatures were obtained; they do not charge that the notes were not amply secured by collateral; they do not charge that the defendant Broyles was not financially sound; nor do they charge, even if these facts were true, that the defendant in error knew at the time that they were false. They do not charge that the representations were made with the intention to deceive. They do not charge damage resulting therefrom, and it is only inferentially charged that they relied upon such representations and were induced thereby to sign the notes.

In an action for deceit all these things must be set out, and the necessity for so doing is borne out by an overwhelming line of authorities.

"In an action for deceit the plaintiff must set out the representations and allege the falsity thereof."

*Vol. 8, Enc. Pldg. & Prac., page 899;  
London, etc. F. Ins. Co. v. Liebes, 105  
Cal., 203.*

*Semple v. Hagar, 27 Calif., 165;  
Williams v. McFadden, 23 Florida, 143;  
Hayes v. Ottawa, etc., R. Co., 61 Ills.  
425;*

*Hayes v. Burham*, 94 Ind. 311;  
*Smith v. Rosenboom*, 13 Ind. App. 287;  
*Crane v. Elder*, 48 Kans., 259;  
*Byard v. Holmes*, 34 N. J. Law, 296;  
*Star Steamship Co. v. Mitchell*, 1st Ab-  
bots Prac. N. S. (N. Y. C. Pl.) 402.

"The declaration in deceit must allege that the false representation was made with intention to deceive."

*Vol. 8, Enc. Pldg. & Prac.*, p. 897, note 5 and cases cited.

The knowledge of the falsity by the person making the representation must be stated.

*Vol. 8, Enc. Pldg. & Prac.*, 902 and cases cited.

The general allegation of false statements, but failing to allege or prove in what particular they were false; held not sufficient.

*Specht v. Allen*, 12 Oregon 117 (6 Pac. 494)

The plaintiff must also allege that he was induced to act by reason of the false representations complained of, and thereby misled.

*Vol. 8, Enc. Pldg. & Prac.*, p. 906 and cases cited.

A recital of the evidence which might raise the

presumption that the representations were relied upon is not sufficient unless the presumption would be conclusive.

*Goming v. White*, 33 Ind. 175.

*Hoffman v. Hoffman*, 33 Ind. 172.

In order to recover damages for false and fraudulent representations, it is incumbent upon the plaintiff to show that the representations were false; that they were known to be false by the defendant; that they were made for the purpose of inducing the contract and reliance placed thereon.

20 Cyc. p. 13.

*Holmes v. Clark*, 10 Iowa, 424.

These cases refer to the necessary allegations of a complaint in an action for deceit, but they are equally applicable to an answer where the defense is based upon false and fraudulent representations.

"The same rules which govern the sufficiency of a declaration or complaint in an action based upon false representations and deceit, and the necessity of proof under such pleadings, have been applied to pleadings in defense."

*Vol. 8, Enc. Pldg. & Prac., page 912,  
and cases cited.*

An instructive case where the defense to a suit on a promissory note was based on false and fraudulent representations, wherein all the elements were alleged, except that it failed to state wherein the representations were false is Specht v. Allen, *supra*. The objection was raised to the introduction of evidence, in this case, but in that case the court at once sustained the objection and excluded any evidence thereof, to which the appellants excepted, and the appellate court in affirming the judgment of the lower court in part, says:

"It seems to me that the question for this court to solve in this case is whether the appellant's answer was so defective that a verdict in his favor would not have aided it. If in such a case a court would arrest the judgment in consequence of the insufficiency of the pleading, the party standing upon it would have no right to complain on account of the mode of practice the court pursued in determining its insufficiency, as he would be in no condition to claim any benefit from such a pleading."

"The appellant in his answer herein alleged a great number of acts and representations of the respondent regarding the land he purchased of him, which, if untrue, in any material particulars, would have been fraudulent, and would have constituted a counter-claim to the respondent's action; but he does not show by any fact he alleged wherein they were untrue. He alleges, it is true, that the

whole matter was a tissue of falsehood, but in what respect he wholly fails to disclose; for instance, that the respondent pointed out to him where and what course certain of the exterior lines of the land ran and that it was false, but he does not allege where and what course they did in fact run. If he had alleged the latter facts, it might, as the respondent's counsel suggests, upon the argument, have shown that the difference was immaterial; and the same may be said of every one of his allegations of the pretended fraudulent statements of the respondents in the premises."

"Fraud in such a case consists in knowingly misrepresenting a fact in some material particular, and it must be so alleged that the court can see from the allegations that such misrepresentations had been made by the party charged. It would not be sufficient to create a liability to allege that the respondent, in order to induce the appellant to enter into the bargain referred to in said answer, fraudulently stated and represented that there was twenty-four feet and upward of water anywhere from the Oregon shore to the Washington territory shore at low water, without an allegation of the true depth of the water between the two points, and showing that there was a material difference between the representation and the fact as it actually existed."

"It is not enough for the pleader in such a case to aver that the representation was false, but he must show wherein it was false in order that the court

may see that the discrepancy is material. An allegation of it being material would only be a conclusion and not a fact. Facts in such cases must be alleged, not conclusions; for it is the former that constitutes a cause of action or defense."

This case goes very much further than is necessary. In the present case plaintiffs in error failed not merely to plead any facts showing wherein the representations were false; there was an entire failure to allege their falsity or any of the other essential elements of fraud. Under no theory, even if plaintiffs in error had not asked for peremptory instructions, could the court have submitted any of these questions to the jury.

#### (2) GENERAL DENIAL.

The general denial of the answer is not sufficient to prove either that the note-was not duly executed by them or to support any evidence of fraud.

The plaintiffs in error in their answer among other things use this language:

"They deny that they or any one of them are indebted to the plaintiff on the promissory notes, copies of which are set forth in paragraph one and four of plaintiff's complaint herein."

*Record, page 6.*

They then attempt to set forth the specific defenses which have heretofore been treated in this

brief.

It is contended that under the general denial they were entitled to offer this proof, (a) in denial of the execution of the note; (b) in defense of the note as to any fraud which they assert was committed in obtaining it.

We have a statute which is a complete answer to this contention of the plaintiffs in error as well as several constructions of the statute by the Supreme Court of the Territory. The statute which we refer to is Section 2984 of the Compiled Laws of 1897, re-enacted sub. sec. 308, chapter 107, 1907, but we will not state the same in full as we will quote from a decision of the Supreme Court of New Mexico which sets forth the statute as well as furnishing a complete answer that the general denial was of such a nature as would have permitted plaintiffs in error to introduce this testimony under general denial.

"Sec. 2984. When a written instrument is referred to in a pleading, and the same or a copy thereof is incorporated in, or attached to such pleading, the genuineness and due execution of such written instrument and of every endorsement thereon shall be deemed admitted, unless in a pleading or writing filed in the cause within the time allowed for pleading, the same be denied under oath: Provided, That if the party desiring to controvert the same is, upon reasonable demand, refused an inspection of such instrument, the execution thereof shall

not be deemed admitted by failure to deny the same under oath. Such demand must be in writing filed in the cause; and served upon the opposite party or his attorney; Provided, That the provisions of this section shall not apply to deeds of conveyance of real estate."

The terms of such statutes have been repeatedly the subject of judicial consideration. An instance of this is found in **Cox v. Northwestern Stage Company**, 1 Idaho, 376, 381, where in construing a statute practically identical with ours it is said:

"The 'genuineness' of an instrument evidently goes to the question of its having been the act of the party just as represented, or in other words, that the signature is not spurious; and that nothing has been added to it or taken away from it, which would lay the party changing the instrument or signing the name of the person liable to forgery. The 'due execution' of an instrument goes to the manner and form of its execution according to the laws and customs of the country, by a person competent to execute it."

It is contended by appellants in the first place that this section was repealed by the Code of Civil Procedure and especially sub-section 40 which provides that the answer "may be a general or specific denial of each material allegation of the complaint controverted by the defendant."

1. We deem it a sufficient answer to this contention to say that so far from repealing section 2984 the Code express-

ly recognizes its continued existence, for in the concluding clause of sub-section 123 of the Code, it is in terms provided that that sub-section "shall not affect \* \* \* section 2984."

It is claimed, however, that a sworn general denial as prescribed by sub-section 40 of the Code, is a substantial compliance with section 2984, since it puts in issue, under oath, all facts which plaintiff is bound to establish to sustain his action, including the genuineness and execution of the instrument sued on. We do not concur in this view. It was distinctly held by this court in *Oak Grove etc. Co. v. Foster*, 7 N. M. 650, tried before the Code, that a sworn plea of the general issue was not a compliance with section 2984. In that case the trial court struck out the second defense, a sworn plea, specifically putting in issue the execution of the note sued on, and the cause was tried upon a "sworn plea of the general issue." This court in dealing with the appeal said, speaking through Mr. Justice Collier:

"At the time the note was offered, objection was made to its admissibility, upon the ground that under the sworn plea of the general issue, its genuineness must be first proven. We do not think that a sworn plea of general issue is such denial as is required by section 1922 (now section 2984) and that as the case then stood the objection was properly overruled. The objection would have stood good, however, if predicated upon the second plea, which we hold to have been improperly stricken out."

The common law plea of general issue was much broader than the code denial, for it permitted evidence not only of matters tending directly to deny plaintiff's cause of action but also of new matters tending to undermine it. Bliss on Code Pleading, Sec. 324; Piercy v. Sabin, 10 Cal. 22; Scott v. Morse, 54 Ia. 732. If, therefore, as held by this court in the Foster case, the common law plea of general issue duly sworn to was insufficient to meet the requirements of section 2984, much less is a verified general denial under the code. We believe it to have been the intention of the legislature in enacting section 2984 and in retaining it by the express terms of the code to require parties defending against written instruments to state specifically any defense against the integrity of the instrument sued on. Instead of lurking behind general denials in a matter of this importance they are required to come out into the open and tender in so many words the issue as to whether the instrument is their instrument. This is in line with the spirit of the Code practice, which has for its purpose the elimination of useless issues and the avoidance of unnecessary expense in preparing the proofs.

We hold, therefore, that the fact that instrument sued on was signed by Toti & Gradi, was conclusively admitted by the absence of a specific sworn denial of that fact and the court below was right not only in admitting the instrument without proof of its execution but also in excluding any evidence tending to impeach its genuineness and due execution.

It is said, however, that the court erred in refusing to permit the defendants to prove, under their general denial, that the instrument sued on was obtained by fraud, and the case of Corby & Weddle, 57 Mo. 452, is cited to support this contention. That case, which permitted proof of fraud under a denial of the execution of the note, is however cited with disapproval by Mr. Bliss in his work on Code Pleading, section 329, and is held by him to be contrary to the proper practice under the code system. While proof of fraud was permitted under the general issue at common law, (Bliss Code Pleading, Sec. 324; Jenkins v. Long, 19 Ind. 28), it is held under the codes, that since fraud admits the execution of the instrument but avoids its legal effect, it must be affirmatively pleaded as new matter. Bliss Code Pleading, Sec. 329; 1 Enc. Plead. and Prac., 844; Jenkins v. Long, 19 Ind. 28.

We are further of opinion that there was no error in the refusal of the court to permit an amendment of the pleadings so as to set up additional defenses. Applications for leave to amend are addressed to the sound discretion of the court and the refusal of a court to permit amendments is ordinarily not open to review upon appeal. Sanchez y Candelaria, 5 N. M. 400. There was certainly here no abuse of this discretion in refusing, with the cause on trial and a jury empaneled, to permit amendments which would have in all probability necessitated a continuance. The case had already been on the docket nearly two

years and this certainly afforded defendants ample time to make up their pleadings."

*Puritan Co. v. Toti & Gradi*, 14 N. M.,  
pages 429-432.

It will be seen that neither (a) under the general issue; (b) or under the special defense, is the testimony which they sought to rely upon admissible. The question was raised at the beginning of the trial that the plaintiffs in error put in all their proof knowing this defect and over the objection of the defendant in error, nor did they amend or offer to amend when the defendant in error asked for a peremptory instruction on this ground. For that reason, if there was no other in this case, we contend that the judgment of the lower court would have to be affirmed.

The alleged unauthorized filling of the blanks is treated under Point No. VIII in this brief; and the alleged material alteration by obtaining other signatures is treated under Point No. VII in this brief.

## POINT NO. III.

IF ALLEGATIONS OF FRAUD WERE PROPERLY PLEADED DEFENDANT IN ERROR WOULD BE ENTITLED TO INSTRUCTION.

But had all the allegations of fraud been properly pleaded and been permissible under the issues, still, the facts in this case are such that the defendant in error would have been entitled to a peremptory instruction.

It is conceded that E. W. Brown, Henry Evans, G. P. Anderson, W. E. Pratt, as he is sometime called, had signed joint and several notes with J. N. Broyles, in November, 1907, for \$25,000.00 in favor of defendant in error and these notes fell due April 9, 1908.

Upon the representation by Broyles to the Bank that he could procure the signature of as many men as the Bank might desire, new notes were prepared for like amounts, payable on demand, and were executed by Mr. Broyels, Charles M. Crossman, Schmidt and Story, Charles H. Story and E. W. Brown, and at that time it was not even intimated that Mr. Johnson, or any other representative of the defendant in error was present; nor did Mr. Story, although he was on the stand, or Mr. Schmidt or Mr. Crossman contend that the dates when these notes were payable were not filled in or contend that there was any fraud in procuring their signatures thereto by the Bank.

However, the Bank before the notes were delivered wanted the other original makers of the old notes on the new note, viz., Pratt (alias Anderson) and Evans, and Mr. Johnson went to San Marcial for the purpose of getting the paper when they had signed it.

Mr. Johnson most emphatically denied that the notes were filled in by him after obtaining the signatures, but asserted the contrary, and also denied that he made any representations to any of the parties or that he had any talk with them until after the signatures were placed upon the notes, and that after the signing of the notes he might have said to Mr. Lewis, that he believed Broyles to be good, and stated that he did so honestly believe, and certainly the defendant in error had shown its faith in the manner in which it carried him. The fact that Broyles was hard pressed for money was but a condition that existed generally, not alone Broyles, but every bank and banker was in like condition, owing to the panic that was sweeping over the country. These parties who were signing Broyles' paper with him were shown to be under like obligations to Mr. Broyles, he having signed their paper.

However that may be, giving the strongest construction, so far as the plaintiffs in error are concerned, we do not see the pertinancy of any facts touching on the so-called false and fraudulent representations, for as has been shown before they apply to Evans, Pratt (alias Anderson) and Brown,

all of whom were but renewal makers. If we were to concede that they signed the new paper by reason of the misrepresentations which they charge, still in what manner were they injured? They signed the original paper and there is no contention that there was any fraud in obtaining their signatures to those notes, and the new paper which they signed was a renewal of the old. Their rights were not changed and their obligation was not in any manner interfered with, and if they rely upon false and fraudulent representations then one of the essential elements is lacking, namely, that of damages.

*Wersman v. Werges*, 112 U. S., 142.

"In order to maintain an action for deceit, it is not only necessary to establish the telling of an untruth, knowing it to be such, with intent to induce the person to whom it is told to alter his conditions, but also that he did alter his conditions in consequence, and suffered damages thereby."

*Ming v. Woolfolk*, 116 U. S. 599.

"In order to recover for injuries caused by false representations, through which plaintiff was induced to perform an act and was injured thereby, it is necessary to establish the making of false representations by defendant; that he knew them to be false and uttered them with intent to deceive plaintiff and to induce him to

act upon them; and that plaintiff relied upon them and acted, and suffered injuries thereby."

*Marshall v. Hubbard*, 117 U. S. 416.  
*Stratton v. Dines*, 126 Federal, 978.

"Fraudulently inducing a person to pay or secure his own debt does not constitute an injury for which an action for deceit can be maintained."

20 Cyc. 42.  
*First Natl. Bank v. Maxfield*, (83 Me., 576) 22 At. 479.

"An answer setting up fraud or deceit as a defense for a promissory note should show damages and the extent thereof."

*Parker v. Jewitt*, (52 Minn. 514) 55 N. W., 56.

The Supreme Court of New Mexico disposes of this matter and has cited additional cases and it would serve no good purpose for us to re-state these cases other than to call attention to them as set forth in Paragraph Four of the original opinion.

The court concludes treatment of this subject in Paragraph Five of the decision and has very forcibly stated our position, wherein it says:

"We deem the present case well within the rule above declared. Even assuming the notes to have been given as the result

of a willful misrepresentation they added no new burden to these defendants. The latter were obligated thereby to no greater duty than previously rested upon them. What they are called upon to do as a result of giving the notes they were equally under obligation to perform before the notes were given. Applying the test in *Morrison v. Lods*, *supra*, they will 'not be damaged by the performance of the contract,' and under the rule in *Story v. Conger*, *supra*, 'the result stands where and as it ought to stand' and the rule in *Deobold v. Oppermann*, *supra*, they are in the matter of results simply 'subject to the liability which they agreed to assume.' Upon the undisputed facts, therefore, the jury could not have found for the defendants and the trial court was right in so holding."

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#### POINT NO. IV.

#### THE COMPLAINT, WITH OTHER MATTERS SHOWN OF RECORD, IS SUFFICIENT UPON APPEAL.

It is admitted that no objection to its efficiency was made in the trial court; it was first raised by assignment of error in the Supreme Court of the Territory, and it is complained here that the point received no consideration in that Court. But plaintiffs in error certainly did not urge this point in that Court. They do not present it in their brief nor in their motion for a re-hearing; Record, p.

275-6: rule 20 of the court, requiring that a motion for a re-hearing "shall distinctly point out that some question decisive of the cause, and duly submitted by counsel, had been overlooked by the court." See Rules 14 N. M. 707.

While the complaint followed literally the form prescribed by a well known author; 1 Bates on Pleading, Parties and Form, 305; and is in quite common use; it is admitted that it is open to criticism, and that some of the allegations therein are awkwardly or defectively set forth; so that had they been called to the attention of the trial court to make more definite and certain, or by special demurrer, that court might have required their amendment. But when the sufficiency of a complaint is first challenged upon appeal, a very different question is presented. It must appear that the complaint presents no cause of action whatever; it is not sufficient that it merely sets forth a good cause of action imperfectly.

"Objections which go merely to the form of the pleadings are waived unless raised in the court below. It cannot be objected for the first time on appeal that the cause of action or defense is defectively stated, or that the complaint or declaration is indefinite or uncertain." \* \* \* It is well settled in most jurisdictions that an objection that the complaint does not state facts sufficient to constitute a cause of action may be urged for the first time upon appeal. "Nevertheless, the reviewing court does not look upon such an ob-

jection with favor, and the complaint will be construed liberally and supported by every legal intendment, and, if it states facts sufficient to render the judgment thereon a complete bar to another suit for the same cause of action, it will withstand the attack."

2 Cyc. 689, 690, 691.

This court has frequently refused to consider objections to pleadings which, if they had been raised in the trial court, might have been sustained.

*The Quickstep v. Byrne*, 9 Wall. 665.

*Renner v. Bank of Columbia*, 9 Wheaton 581.

*Bank of United States v. Smith*, 11 Wheaton 171.

*Friedenstein v. United States*, 125 U. S. 224.

*National Security Bank v. Butler*, 129 U. S. 223.

*Dushane v. Benedict*, 120 U. S. 644.

*Ankeny v. Clark*, 148 U. S. 345.

And so has the Territorial Supreme Court of New Mexico:

*Telegraph Co. v. Longwill*, 5 N. M. 308-316.

*Coler v. Board of County Commissioners*, 6 N. M. 88-117.

*Chavez v. Myers*, 11 N. M. 333-343.

In the first and third of these cases, the sufficiency of the complaint was involved. In all three the pleadings were drawn before the adoption of the Code of Civil Procedure. But that Code not only sanctions, but requires such a course of decision:

"The court shall in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not effect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

*Compiled Laws, 1907, Sec. 2685, Sub-Sec. 85.*

Plaintiffs in error, however, quote briefly and rely upon the case of *Canavan v. Canavan*, recently decided by our State Supreme Court, and reported in 131 Pac. 493. If this case effected an alteration in matters of procedure as theretofore determined by the decisions of the Territorial Supreme Court, it would not subject this case to reversal.

*Ankeny v. Clark, supra.*

An examination of *Canavan v. Canavan*, however, will show, that so far from supporting the contention of plaintiff in error in the present case, it is, in several respects, an effective answer to

those contentions. The failure of the complaint to allege plaintiff's residence for one year prior to its filing was held to be rather jurisdictional, than a failure to state a cause of action, and the reasoning proceeds along this theory. After using the language quoted in plaintiff in error's brief, the court says:

"This is necessarily so because parties, while they may submit their persons to the jurisdiction of the court, can, by no act of theirs, confer upon the court jurisdiction of the subject matter. Ordinarily, the subject matter of a cause of action is determined exclusively by the complaint which enumerates and states all of its different elements. If a material element is omitted, no legal cause of action is stated, and no jurisdiction to render a judgment arises. But the omitted element of the cause of action may be brought into the record otherwise than by the complaint. In the case at bar, the omitted element, viz., the required residence of the plaintiff, was brought into the record by the proofs in the case, which are undisputed, and the fact is admitted by the defendant himself. The proofs are before us as a part of the record, from which we have a right to find, and we do find, that the required residence prior to the institution of the action existed. The vicious consequences of the general doctrine thus stated have led to the formation of various rules, both statutory and of decision, calculated to curtail its effect."

The court then alludes to various common law rules, such as "express aider," "aider by verdict," admission in the evidence on an argument by the opposing party, and then quotes various provisions of the New Mexico Code in regard to amendments, etc., concluding with sub-section 94, which is as follows:

"All omissions, imperfections, defects and variances, not being against the right and justice of the matter of the action, and not altering the issue between the parties on the trial, shall be supplied and amended by the court where the judgment shall be given, or by the court into which such judgment shall be removed by writ of error or appeal."

After construing and applying this provision, the court concludes that it is its duty to amend the complaint, so as to allege the required residence of the plaintiff, but that the actual amendment need not be made, the complaint being treated as amended.

If it were necessary, the doctrine of this cause could be applied to the present, inasmuch as the evidence offered by plaintiffs in error themselves, was ample to supply the supposed defects in the complaint, namely the execution and delivery of the note, and the fact that no sum whatever was received by defendant in error between the date of their execution and the filing of the complaint, which could in any way be applied to their pay-

ment, except the amount endorsed and admitted by the complaint as a credit on the second note. See opinion of the court, transcript p. 287. But in the present case, it is not necessary to apply this doctrine.

Incidentally, the Canavan case meets the contention of counsel that the New Mexico Code adopted the original Field Code, by stating that our Code provisions came from Missouri, a statement which has, we believe, been frequently made by the Territorial Supreme Court. We do not seek to minimize the importance of counsel's discovery that many of the provisions of the Field Code were adopted, with changes, by the New Mexico code, and if counsel will extend his researches, he will doubtless find the same is true of nearly every other Code state. The Canavan case brings out, however, the fact that other Code provisions have been added which either modify some of the provisions of the Field Code, or at least have an important bearing upon the questions arising under them. We will revert to one or two or these later.

Proceeding now to the allegations claimed to have been omitted—the want of an allegation as to execution and delivery;—1st, such allegation does not seem to be necessary, in view of the sub-sec. 308 of the Code, (Laws 1907, Chap. 107, p. 296), which provides:

“When a written instrument is referred to in a pleading, and the same, or a

copy thereof is incorporated in, or attached to such pleading, the genuineness and due execution of such written instrument and of every endorsement thereon shall be deemed admitted, unless, in a pleading or writing filed in the cause within the time allowed for pleading, the same be denied under oath."

This provision and the construction which our courts have placed upon it, is discussed at length in another part of this brief. It is only necessary to revert to the fact that the words executed and execution, when applied to a written instrument, ordinarily include the performance—of all acts which may be necessary to render it complete as an instrument importing the intended obligation—signing, sealing and delivery.

*17 Cyc. 875-876, and cases cited.*

2nd. The common law doctrine of express aider is also applicable. Any short-comings of the complaint, alleging execution and delivery have been kindly supplied by plaintiff in error in their answer, from which we extract the following: "and that defendants executed said notes as accommodation makers for said defendant, Broyles" \* \* \* "that thereupon, and immediately thereafter, said notes were delivered by defendant, Broyles, to plaintiff." Record, p. 7.

Plaintiff in error also insists that the complaint contains no allegation of non-payment, and that

such allegation is necessary.

The complaint, in the first count, alleges: "There are no credits or endorsements upon said note, and there is now due and owing plaintiff, from said defendant, thereon, the sum of Ten Thousand Dollars," etc. In the second count it alleges: "The following is the only credit and endorsement on said note," stating it, and followed by a similar statement as to the amount due and owing, which was the amount of the note, less the credit endorsed. We submit the statement that there are no credits, except the one specified, is a sufficient statement of non-payment, especially when taken in connection with the averment as to the amount due and owing. It is true that this last averment is open to criticism, as stating a conclusion of law; but it seems to be something more. It is a conclusion of law, arising from the facts already stated; and also an assertion as a present fact that the indebtedness remained. In Nevada, where the doctrine that the complaint must allege non-payment, is insisted upon, a similar statement was held sufficient, upon general demurrer, and the case in 1st Nevada, cited in plaintiff in error's brief, was distinguished.

*Howard v. Richards*, 2 Nev. 128.

But we cannot conceive that an averment of non-payment is necessary under the Code, in a complaint on a promissory note. In an early New

York case, Mr. Justice Selden reviewed the common law doctrine that the defendant, on an issue of non-assumpsit or nil debet, could introduce evidence as to payment, pointed out its illogical character and the inconveniences arising therefrom, and that one of the objects of the Code was to abolish this doctrine and to require the defendant to plead payment, if he intended to rely upon it. And concluded "that neither payment, nor any other defense which confesses and avoids the cause of action, can in any case be given in evidence as a defense under an answer containing simply a general denial of the allegations of the complaint."

*McKyring v. Bull*, 16 N. Y. 297-299.

The conclusion reached by him has been followed in New York, and, we believe, in every other Code state, without exception. But in New York and the few other states which also hold that it is necessary to allege non-payment in the complaint, it has resulted in conflicting decisions, and in illogical conclusions. Thus, in *Van Gieson*, 10 N. Y. 316, cited in plaintiff in error's brief, it appears to be held that where the complaint contained an averment of non-payment, a plea of payment formed a complete issue, and that payment having been denied in the complaint it was unnecessary to repeat that denial in reply. While in *Lent v. Railway Co.*, 130, N. Y. 504, it is held that

an allegation of non-payment in the complaint is essential, although plaintiff is not required to prove non-payment, nor is the defendant permitted to meet the allegation by a general denial. He is still required to plead payment affirmatively, in order to introduce evidence.

The doctrine that the complaint must contain an allegation which is not required to be proved, and which cannot be denied, appears to be in direct conflict with sub-sec. 49 of our Code, which provides:

“No allegation shall be made in a pleading which the law does not require to be proved, and only the substantive facts necessary to constitute the cause of action or defense shall be stated.”

But the New York doctrine has been by no means universally followed. The question has usually arisen upon the want of an affirmative averment of payment in the answer, and the later decisions are uniform to the effect that payment is an affirmative defense, and must be pleaded.

*Ferguson v. Dalton*, 158 Mo. 323.

*Bank v. Child*, 76 Minn. 173.

*Mullen v. Morris*, 43 Neb. 596.

*Cady v. S. Omaha Nat. Bank*, 46 Neb. 756.

*C. I. & W. Power Co. v. Cox*, 52 Neb. 684.

*Meating v. Tigerton L. Co.*, 113 Wisc. 379.

*Hummel v. Moore*, 25 Fed. 380.

*Welles v. Assurance Co.*, 49 Colo. 508.

*Harvey v. Railway Co.*, 44 Colo. 258.

*Rutherford v. Gaines*, 103 Tex. 263.

*Pickle v. Anderson*, 62 Wash. 552.

In a number of these cases, as in *Rutherford v. Gaines*, the court held there was no allegation of non-payment in the complaint. In others, it is expressly held that such an allegation is not necessary. Thus, in *Hummel v. Moore*, where the answer denied that defendant had not paid the same, Judge Hallett said:

“Whether this be true or not, an issue as to payment cannot be raised in this manner. It was not necessary to aver that the note was unpaid, and if necessary, a negative averment of that kind cannot be made by a denial.”

And in *Meating v. Tigerton*, it is said:

“Objection that the complaint does not state a cause of action because it is not alleged that the amount earned by plaintiff has not been paid, is not tenable. There is no presumption of payment within the statute of limitations. Payment is an affirmative defense, and must be set up in the answer, or evidence of that fact will be excluded.”

The inconsistency of requiring a plea of payment as new matter, and at the same time an allegation of non-payment in the complaint, is pre-

sented by an eminent author on Code pleading, as follows:

"The plea of payment is new matter. The claim is plausible that inasmuch as no cause of action can arise upon contract without its breach, inasmuch as the breach—as, non-payment—must be alleged, it becomes part of the plaintiff's case, and is involved in a general denial. But whether, in an agreement, as to pay money, it is incumbent on the defendant to plead the fact of payment as new matter, should upon principal depend upon the necessity of showing the fact of non-payment as part of the plaintiff's case. If he is bound to prove in the first instance that the promissory note has not been satisfied, or that the price for, value of, the work and labor, or the property sold, has not been paid, then the default should be so affirmatively stated that the issue may be taken upon it, and the fact of payment does not become new matter. If, on the other hand, it is sufficient for him, in making his *prima facie* case, to establish the agreement, or the work or sale, with the price of its value, and if the obligation thereby created has been discharged—as, by payment—it becomes the duty of the defendant to prove that fact, then such fact is new matter, to be specially pleaded."

*Bliss on Code Pleading*, (3rd ed.), Sec.  
357.

Another eminent author says:

"As the general denial forms an issue upon the entire cause of action set up by the plaintiff, and forces him to prove the same substantially as alleged, the question becomes one of great practical importance. What are the averments in the complaint or petition which are thus negative, and which must be established by sufficient proof on the trial? The full answer to this question belongs rather to a discussion of the requisites of the plaintiff's than of the defendant's pleading, and will be found in Chapter 3rd. The universally accepted rule is, that only those averments of the complaint or petition which are material and proper are put in issue by denial, either general or specific in its form. 'Material' or 'proper' are not, however, synonymous with 'Necessary.' A plaintiff may insert in his pleading allegations which are unnecessary in that position, and which are not in conformity with the perfect logic of the system, but which when once introduced, become 'material,' so that an issue is formed upon them by a general or specific denial. The instance just mentioned, of an allegation of non-payment in the complaint met by a denial in the answer, is a familiar example of such averments, material, although not necessary."

*Pomeroy Code Remedies*, (3rd ed.),  
Sec. 667.

Counsel also states that an allegation "that the plaintiff is the owner of the note" is necessary. He does not cite any authorities on this prop-

osition, nor can he.

The payee of a note need only allege execution and delivery by the maker, without an averment of title.

8 Cyc. 120.

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#### POINT NO. V.

DEFENDANT IN ERROR COULD NOT APPEAL FROM ADVERSE RULING ON ADMISION OF EVIDENCE WHICH WAS CURED BY INSTRUCTION OF THE COURT.

Plaintiffs in error have urged this court that the sufficiency of the defendant's answer is not available in order to support judgment.

We do not fully comprehend the scope of this point raised by the plaintiffs in error. While the court did admit certain evidence over the objection of the defendant in error, *upon a motion for a peremptory instruction based among other things upon the insufficiency of the pleadings, it excluded this evidence and gave judgment in favor of the defendant in error.* The best answer to this argument is to be found in the opinion of the Supreme Court of the Territory in this case wherein it says:

"It is urged, however, by the appellants that the court admitted proof upon this question over plaintiff's objection that it was not within the pleadings, and that plaintiff not having taken an appeal from such ruling it should not be heard

now to sustain the judgment upon a theory held against it on the trial. Morgan v. Southern Pacific Ry. Co., 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143, and Wangler v. Swift, 90 N. Y., are cited to support this position. But how could plaintiff appeal from an adverse ruling on the testimony? Appeals, of course, lie only from final judgment and that judgment was in its favor. The defendants were notified by repeated objections on the trial—their brief says ‘something like one thousand times’—that the plaintiff relied among other things upon defects in the pleading. Indeed one of the grounds of plaintiff’s very motion to instruct, which the court sustained, was that ‘the defense is not admissible under the state of the pleadings and does not conform thereto and the issues which have been raised thereby are not issues which have been raised by the pleadings.’ This was a further and definite notice that inadequacy in the pleadings was claimed as against defendants’ contentions. The latter therefore in failing to amend proceeded at their peril and cannot now be heard to complain because the terms of their answer failed to justify the submission to the jury of an issue upon which defendants desired the jury’s judgment. The rule that proof must be based upon pleadings is too well established to be made to yield to the contention here made.”

*Record, pages 286, 287.*

POINT NO. VI.

TAKING OF NON-SUIT AS AGAINST THE DEFENDANT CHARLES LEWIS.

This matter is treated in assignment of error No. 7. The defendant in error elected to take a non-suit against Lewis and a peremptory instruction as to the other defendants.

These notes, as shown by reading of them, are joint and several, but independently of the reading of the notes the laws of the Territory made all contracts joint and several. We, therefore, desire to direct attention to the condition of the statute law by setting out the various statutes. They are as follows:

Compiled Laws of 1897.

Section 2894.

"All contracts, which, by the common law, are joint only, shall be construed to be joint and several."

Section 2895.

"In all cases of joint obligations, and joint assumptions of co-partners, and others, suits may be brought and prosecuted against any one, or more, of those who are so liable."

Section 2946.

"All contracts, which by the common law are joint only, shall be held and construed to be joint and several; and in all cases of joint obligations or assumptions by partners and others, suit may be brought and prosecuted against any one or more of the parties liable thereon, and when more than one person is joined as

defendant in any such suit, such suit may be prosecuted, and judgment rendered against any one or more of such defendants."

**Sub.- Sec. 7, Section 2685.**

"Every person who shall have a cause of action against several persons, including parties to bills of exchange and promissory notes, and who shall be entitled by law to one satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable as he may think proper, and he may, at his option, join any executor or administrator or other person liable in a representative character with others originally liable."

**Sub. Sec. 105, Section 2685.**

"When an action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants, but the action shall not abate as to other defendants, and shall proceed to final judgment against any or all of such other defendants, and when necessary more than one judgment may be rendered in the same action."

**Section 2908.**

"Any cause pending in any court of this territory may be dismissed by the plaintiff in said cause, at his costs, at any time before the same is submitted to the jury in causes tried by the jury, or before judgment has been rendered in causes tried by the court."

It will be noticed from a reading of the foregoing statutes that a plaintiff may elect to sue one, more or all of the parties, or having sued one, more or all has a right to dismiss as to any one or more.

This is a general principle of law even without an express statute.

"The plaintiff having chosen to sue them all, it could at any time take a non-suit as to any one or more."

*Vol. 6 Enc. Pld. & Prac., 834.*

"And in such case it may be taken without the consent of the defendant."

*Vol. 6 Enc. Pld. & Prac., 835.*

The effect of a non-suit is not to release the party and this has often been construed by decisions of this court.

*U. S. v. Parker*, 120 U. S. 95.

*Gardiner v. Mich. Cen. Ry. Co.*, 150 U. S. 356.

*Manhattan Life Ins. Co. v. Broughton*, 109 U. S., 124.

The Supreme Court of this Territory has also passed upon this question and the following is taken from the syllabus:

"The payee of a joint and several note

may look to either of the joint makers for payment and where one of the joint makers dies, is not compelled to pursue his remedy against the estate of the deceased debtor; nor is his action barred against another joint maker because the time has expired wherein he might have presented his claim against the estate for allowance."

*Newhall v. Field*, 13 New Mexico, 82.

#### POINT NO. VII.

#### REFUSAL OF THE COURT TO SUBMIT TO THE JURY THE QUESTION AS TO WHETHER THE SIGNATURE OF LEWIS WAS NOT OBTAINED BY FRAUD.

As we have shown in discussing the taking of non-suit as against Lewis, Point No. VI, he was not released.

In order that a proper conception of the case may be had, we will briefly recite the history of this part of the case.

It is admitted by all the testimony that the notes sued upon were renewal notes so far as the plaintiffs in error, Jasper N. Broyles, E. W. Brown, William E. Pratt (alias Anderson), and Henry Evans were concerned. The notes given on April 9, 1908, by these parties were to take up notes signed by them November 20, 1907, and which were then due. The additional signatures to the new notes consisted of Franz Schmidt and Story, Charles M. Crossman and Charles Lewis. It is uncontra-

dicted that no representations of any kind or character were made by the defendant in error in obtaining the signatures of Franz Schmidt and Story and Charles M. Crossman. The record shows that Franz Schmidt was not placed upon the stand, or that any evidence was offered as to any representations made to him. Charles Story while taking the stand gave no testimony of that character; Charles M. Crossman did not take the stand, nor was there any testimony of any representations made to him by the defendant in error. The only one of the new signers who testified to any false representation was Charles Lewis, wherein he testified that one Johnson, a representative of the defendant in error, had said to him as follows:

"After examining Mr. Broyles' business he (Johnson) found Mr. Broyles was in good shape, and that these notes were well secured by collateral."

*Record, page 146.*

It will be noticed that the signatures on the notes are improperly set forth in the exhibits as to the order in which they were obtained. J. N. Broyles, Franz Schmidt and Story, Charles M. Crossman and E. W. Brown signed the notes first which was about April 7, 1908. Record page 70. The last three signatures were Mr. Evans, Mr. Lewis and Mr. Pratt (alias Anderson). Record

pages 70, 112, 129, 137, 138, 140, 141.

It is uncontradicted that all of the signatures were unconditional, but it is contended by the plaintiffs in error because there was evidence of misrepresentation in the procuring of the signature of Lewis, a subsequent signer, who was not renewing his original paper, *and without any understanding by the other signers that he was to sign, and before the instrument was completed and delivered*, that it should have been submitted to the jury as a question of fact as to whether Lewis was induced to sign these notes by misrepresentation, and that if he was so induced it would have released all of the prior signers thereto.

*This issue is not suggested by the pleading in any particular, nor by any of the instructions asked, nor by any of the objections made.* If plaintiffs in error conceived this to be the proper view of the law, it was their duty not to have objected to a non-suit, because that was clearly a right which the defendant in error had by a statute, but to have asked to amend their pleadings when a non-suit was taken as to the defendant Lewis and asked that the jury might be permitted to pass upon the question as to whether or not the release of Lewis would release them. This was not done or attempted to be done. As to what was done we desire to call attention to record, pages 253 and 254, wherein the defendants say:

"Defendant Lewis and his co-defendants object to the granting of a motion in non-suit and insist that under the rulings of the court sustaining partly a motion made by counsel for plaintiff in this case and overruling it as to Lewis that not only Lewis but his co-defendants are entitled to a decision at the hands of the jury in this case, but to an instruction by the court to the jury to return for the defendant Lewis."

As we have pointed out before this is a mere objection to the granting of a non-suit as to the defendant Lewis.

*But had the plaintiffs in error properly pleaded this issue or amended their pleadings after the taking of a non-suit as to the defendant Lewis, still from the manner of the signing and execution of these notes they would not have been entitled to avail themselves of the defense.*

The plaintiffs in error by signing the paper gave an implied authority to fill it up, and the insertion of another co-obligor was not inconsistent with the general authority resulting by implication of law.

"The implied power to fill blanks extends to all parts of the paper. It extends to the promise itself; to the signatures."

*Vol. 7 Cyc., page 621.*

*Bank of Commonwealth v. McChord and Payne, 4 Dana 191 (29 Am. Decisions, 339).*

*Snyder v. VanDoren*, 46 Wis. 602 (32  
*Am. Reports*, 739).  
*Angle v. North Western M. L. Ins. Co.*,  
92 U. S. 330.

The evidence discloses in this case that while Broyles, Brown, Crossman, Schmidt and Story had signed these notes about the 7th of April, 1908, they were not completed instruments as they had not been accepted by the bank, and when they were sent to the bank, the bank immediately discovering that part of the original signers were not on the paper and desiring such original signers, and upon assurances from Broyles that he could get as many men to sign the paper as it might desire, the notes were not accepted but returned. The notes were not completed and accepted until the 9th day of April, 1908, and the first signers having signed in blank, they were therefore bound by the implied authority as hereinbefore set forth.

The position contended for by plaintiffs in error was based upon our negotiable instrument law, Section 55, Chapter 83, Laws 1907, which reads as follows:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force, fear or other unlawful means or for an illegal consideration or when he negotiates it, breach of faith, or any such circumstances as amount to fraud."

Section 55 in this respect has announced nothing but law merchant.

The theory under which the law merchant proceeded was that if three or more persons signed a note with the understanding, that other persons were to sign the same, and such other persons' signatures were not secured, or where one of the signatures was obtained by fraud or qualified by contract or arrangement by which he was not held liable, it would be fraud upon the other signers, and, therefore, if any of the subsequent signers were released the prior signers would also be released.

"If a note be drawn with the intent that it shall be signed by several persons and one or more of them sign it on representation by the payee or by an understanding with him that the others will sign it and they do not sign it, it is not valid against the actual signers."

*Vol. 1 Parsons on Notes and Bills*, 232.

Also it has been held if a person signs a note and finds upon that note prior signatures that he has a right to assume that the prior signatures were unconditional makers of the note, and that would be fraud upon him if any one was a conditional signer in any particular, unless such information was conveyed to him at the time the note was signed.

Two cases are relied upon from the State of

Wisconsin. The cases cited were used before the trial court, also in the Supreme Court upon the original hearing and again cited in the motion for a rehearing.

We respectfully submit that a decision of this kind would be contrary to the whole theory of law merchant and the whole theory of the law of negotiable instruments, as it has been construed by the courts for many years.

"A discharge of a subsequent endorser can discharge no prior party."

*Daniels on Negotiable Instruments,*  
Vol. 2, 1307.

But the doctrine contended for by the plaintiffs in error in the Wisconsin cases would be that *where notes were signed in blank and before delivery if there was an ineffectual attempt to secure additional signers it would release all signers.* If the Wisconsin cases so held, we would insist that these cases are contrary to the overwhelming line of authorities as to the construction placed upon a negotiable instrument. However, we submit that the Wisconsin cases have not announced the doctrine contended for, and when they are analyzed and examined as to the facts they do not in any particular bear out this contention. The case where the doctrine is supposed to have been announced is that of *Hodge v. Smith*, 130 Wis., 326 (110 N. W. 193). A reading of this

case will show that the facts were entirely different from those involved here; based upon a different principal and were such as would have come within the law merchant had the negotiable instrument act not been adopted.

In that case plaintiff, who was not a holder for value as found by the court, stood in the shoes of the payee, had taken a note from some twelve persons. It was a note in payment of a stallion, a bill of sale having been made to fourteen persons with the distinct understanding that fourteen persons were to sign the note and thereby each being liable for \$200.00. There was some evidence in the case as to the names of the particular additional persons who were to sign the note and who did not sign it. This was represented to at least a part of the defendants, but the court found that whether the facts were so represented to all of the defendants as to whom the persons were, *that it was represented to all of them that there were to be fourteen signers and uses the following language:*

“But let that be as it may, the real substance of the defense pleaded on this branch of the case is that it was represented to those who signed the note, as an inducement for them to do so, that there were to be takers of the then fourteen shares of two hundred dollars per share and that fourteen persons should sign the paper and that the notes should not take effect as a binding obligation

until such signatures were obtained, and the trial court so found."

*Hodge v. Smith, supra.*

It developed that there were not fourteen *bona fide* takers, but only twelve and of these a number were conditional signers; therefore the court very properly held to release any one of the parties would release them all.

As stated before Section 55 of the negotiable instruments law need not have been invoked to reach this conclusion, for it was the law merchant. It was fraud to attempt to hold part of the signers when it was unconditionally agreed there were to be fourteen signers and when as a matter of fact there were actually only twelve and of this number a part of them conditional signers.

Under a later case of *Aukland v. Arnold*, 131 Wis. 64 (111 N. W. 213) practically the same sort of condition existed as in *Hodge v. Smith, supra*. It was for notes given in payment of a stallion with a number of defendants. The defendants pleaded in this case that there was false and fraudulent representations in procuring their signatures to the paper and that it was stated to be a guarantee instead of a note. The jury specifically found that the payee in the note, for the purpose of inducing the defendants to sign the same, knowingly, falsely and fraudulently represented to them that it was a paper different in character and nature from a promissory note,

and further they found that the defendants could not by the use of ordinary care have obtained knowledge of its character and nature. The plaintiff asked for a change of the special findings of the jury from "no" to "yes," except as to one defendant as to whom the payee admitted the answer to be supported by the evidence. This motion being denied an appeal was taken from the judgment. As stated before, it will be found that all of the parties were to sign the note, being an understanding between them that all should sign at the time of obtaining each of their signatures; therefore the admission by the plaintiff that one of the number of parties sought to be charged was entitled to be relieved would of course relieve all—the burden would not be distributed as the parties had intended and would therefore be a fraud upon the parties who had signed it. The court in that case uses the following language:

"This conclusion was reached upon the ground that when several persons assume such an obligation, it is material and important that all who join as makers should share equally in bearing the burden of its payment, and if through fraud of the person holding it such equality of burden is distributed and increased as to some of the persons signing it, such fraud renders the title defective as to all of the persons who sign it."

Citing and quoting with approval the case of *Hodge v. Smith*, *supra*. The court then construed the second part of the negotiable instruments law of Wisconsin which reads somewhat differently from ours, but which is immaterial as the question is not involved.

Both of these cases, as before stated, are simply declaratory of the law merchant; five persons agreeing to sign a note; each one agrees to sign upon condition that the other four sign and of course irrespective of the order of signatures. If any one of the five was relieved, the burden was increased upon the remaining four and therefore it would be a fraud upon the remaining four **in case the fifth signer was relieved** and therefore it would release all of the parties.

In both of these cases the court will plainly see that the decision was absolutely correct. No other conclusion could have been reached under the negotiable instruments law or under the law merchant, but this is not that kind of a case. Nor can the Wisconsin cases be taken as precedents that where three parties sign a joint and several note unconditionally and another person before delivery and acceptance adds his signature to it, that the said party being a conditional signer and the attempt to secure his signature being ineffectual, would relieve the parties who unconditionally signed the paper.

This rule of law is not only applicable to negotiable instruments, but applies to all classes

of contracts and is based upon the theory that the contract has not been consummated and that the written instrument was never in fact delivered as a present contract, unconditionally binding upon the obligor according to its terms, from the time of such delivery but is left in the hands of the payee to be an absolute obligation by the maker in the event of his securing additional signatures or upon some other contingency.

*Burk v. Delaney, et al.*, 153 U. S. 228.

*Ware v. Allen*, 128 U. S. 591.

But if a note or contract is delivered without any such condition, it of course does not go to the delivery and is effective.

*Mitchell v. Altus State Bank (Okla.)* 122  
*Pac.*, 666.

*As we have shown before this question was not even involved in this case owing to the status of the pleadings.* The Supreme Court of New Mexico passed upon this matter and as we understand it, if it be a question of practice or the construction of a statute, it will be followed by this court, unless such construction is manifestly wrong.

*Sweeney v. Loome*, 22 Wall. 208.  
*Armijo v. Armijo*, 181 U. S. 561.

"At least we cannot say that it was

manifestly wrong as must be done to justify us in rejecting the local interpretation of a territorial statute."

*Straus v. Foxworth*, 231 U. S. 42.

"The only question is whether any sufficient reason appears for not following the construction given to a local statute by the territorial court when that construction is inherently reasonable. It is at least the first to strike the mind and is one that protects private rights. It is enough to answer that on the principle followed so far as may be by this court, there is no manifest error as to warrant us in reversing the decision below."

*Treat Treas. v. Grand Canyon Railroad Co.*, 222 U. S. 448-452.

"It is true that this ruling of the Supreme Court of the Territory does not, even in questions of practice arising under the local laws, preclude this court from reviewing it, as would a decision of a State Supreme Court in similar circumstances; but unless a manifest error be disclosed we should not feel disposed to dispute a decision of the Supreme Court of the Territory construing a local statute."

*Fox v. Hearstick*, 156 U. S. 674.

*English v. Ariz.*, 214 U. S., 359.

*Copper Queen Mining Co. v. Ariz. Board*, 206 U. S. 474.

POINT NO. VIII.

FILLING IN BLANKS IN THE NOTES, IF ANY BLANKS THERE WERE.

This question is suggested by assignment of error No. 15. It is stated in the answer:

"That at the time when defendants' signatures were so, as aforesaid, obtained, the time when said notes were to be payable was in blank, and these defendants were further falsely and fraudulently informed by defendant Broyles and plaintiff, in substance and to the effect that the defendant Broyles was to be given such time within which to pay the indebtedness evidenced by said notes as he might require, and were left in ignorance of the intention to make said notes payable on demand as appears from copies thereof set forth in plaintiff's said complaint and of the fact that defendant Broyles in filling in said notes so as to make them payable on demand, had been and was guilty of breach of faith with these defendants."

It will be noticed that the answer does not even attempt to set out the fact that the blanks were not filled out as was intended by the parties, but leaves it that the notes were in blank and that they were in ignorance that they were to be made payable on demand, but wholly fails to state that it was understood or agreed or that they directed the same to be filled out at a certain time in future, but to the contrary, they allege

upon the theory of false and fraudulent representations, that defendant Broyles was to be given such time within which to pay the indebtedness, as he, Broyles, might require.

We have sufficiently treated this allegation as a so-called false and fraudulent representation in considering the points of law under that head, wherein we have shown that it lacked all of the elements applicable to a defense for deceit. Point No. II.

We have also called attention to the cases showing the implied power to fill blanks under Point No. VII.

We shall now consider it upon the other theory of being an improper filling of blanks.

The proof offered by Brown, Broyles and Pratt, giving full force to their statements, was, that the notes were to be made payable six months after date. This sets up an entirely different defense from the one pleaded. In fact, contradicts the allegations in their answer, that defendant Broyles was to have such time within which to pay the indebtedness, as he, Broyles, might require.

Under this condition of the pleading, this sort of proof is not competent as tending to prove any issues, and it is very questionable whether the pleadings could have been amended, after the proof was in, to conform it thereto so as to prevent a variance, because the proof was inconsistent with the answer and there was want of proof upon the allegations contained in the answer.

"In case of failure to prove there can be no amendment; dismissal of the action is the proper course."

28 Amer. Enc. Law, 1st Ed., 58.  
Pomeroy on Code Pleadings, Sec. 448-452.

"The proof must correspond with the allegations of the pleading."

*Owen v. Meade*, 104 Calif. 179 (37 Pac. 923).

*Winterburg v. Winterburg*, 52 Kan., 402 (34 Pac. 971).

*Dickey v. Northern P. Ry. Co.*, 19 Wash. 350 (53 Pac. 347).

*Kelley v. Cable Co.*, 13 Mont. 411 (34 Pac. 611).

*Noland v. Great Northern Ry. Co.*, 71 Pac. 1098 (Wash.)

*Agers v. Wolcott*, 92 N. W. 1036 (Neb.)

*Central R. R. & Bank Co. v. Hotkiss, et al.*, 17 S. E. 838 (Ga.)

"A motion after the close of the evidence, to confirm the pleadings to the proof can never be granted where the admission of the evidence was promptly objected to when it was offered, upon the grounds that it did not tend to support the allegations in the pleading."

Vol 8, Enc. Plead. & Prac., 585.

It is unnecessary to determine whether or not it was a matter which could have been amended, because the defendants did not amend and did

not ask to amend, but elected to stand upon their answer, setting forth, as before stated, that Broyles was to be given such time as he, Broyles, might require. In other words, in the answer, the defendants are attempting to defeat the action on the ground of false and fraudulent representations as to the time to be extended to them, and they offer proof tending to show improper filling of blanks; therefore, the court could not, under this issue submit this question of fact to the jury, if they had so requested.

*This is purely a question of pleading and has been determined and passed upon by the Supreme Court of New Mexico and comes within the rule of the line of cases hereinbefore referred to as outlined in*

*Sweeney v. Lomme*, 22 Wall., 208.

*Armijo v. Armijo*, 181 U. S. 561.

A reference to the opinion in this case will show that this was distinctly ruled upon and sufficiently answers the contention of the plaintiffs in error.

#### POINT NO. IX.

#### PAYMENT OF CLAIM BY PLAINTIFFS IN ERROR.

This question has been raised by assignment No. eight Point No. seven in plaintiffs' in error brief.

We have heretofore stated our position in re-

gard to the collateral held by the defendant in error. Prior to April 9, 1908, the defendant in error held the joint and several notes of the plaintiffs in error, Broyles, Evans, Brown, and Pratt, aggregating the sum of twenty-five thousand dollars. These fell due April 9, 1908. The defendant in error also discounted some nine thousand dollars worth of notes of other persons which they secured for Mr. Broyles, which of course contained his endorsement. It also carried an overdraft against Mr. Broyles ranging from a few hundred to ten thousand dollars. It had some collateral, a list of which is set out in the exhibit. It was a general collateral. Among such collateral was the note of the New Golden Bell Mining Company for the sum of five thousand, nine hundred thirty-eight dollars; a note of James F. Wells for one hundred and seven dollars and thirty-five cents; note of Johnson Crawford for thirty-five dollars and Clayton note for fifteen dollars. Prior to April 9, 1908, the Clayton note had been paid; subsequent to April 9th, 1908, namely on April 30, 1908, the Johnson note for thirty-five dollars was paid and on May 27, 1908, and subsequent to the issues formed in this case, the judgment against the New Golden Bell Mining Company was satisfied. On June 1, 1908, the Wells note for one hundred and seven dollars and thirty-five cents was paid. The plaintiffs in error are insisting that these are payments and should be credited

upon the two notes involved in this suit; under what theory we are at a loss to understand, because it is shown by the evidence there was another ten thousand dollar note of this same series, given at the same time, which is not involved in this suit; and further that there is outstanding the overdraft and discounted paper with Broyles' endorsement thereon. The court could not have instructed peremptory as to any of these payments, or have submitted them as a matter of fact to be decided by the jury, because the Clayton note was paid before the execution of the note in controversy, and all the other notes were paid long after the institution of the suit, and even if the payments were applicable upon these notes the plaintiffs in error could only raise this question by an amended answer or special plea of payment after the institution of the suit. It is in effect the old common law plea of *puis darrein continuance*.

We have already called attention to the fact that under code pleading payment must be specifically plead under Point No. IV.

In regard to the one thousand dollar payment, when the witness Johnson was on the stand he was asked upon cross examination what a certain check which was shown to him was to apply upon. He in effect stated that somebody had written on the check, but not plaintiff or its agent, that it was to apply upon interest on the twenty-five thousand dollar notes; and upon being asked if

he knew what it was to apply upon, he distinctly stated he did not and could only be shown by reference to the records of defendant in error, which would clearly show what it was for, but plaintiffs in error did not see fit to call for these records; and further did not see fit to even introduce the question itself, and still asked the court to declare as a matter of law that defendants were entitled to the credit of this one thousand dollars upon the note in the face of the fact that neither of the plaintiffs in error or any one else testified or attempted to testify that any such payment had been made. Record, pp. 176-177.

The court below disposes of this and a number of other matters of a similar character, and the same is a complete answer to the plaintiffs in error. As it is so pertinent we shall re-state it:

"The same observations apply to several other defenses which defendants complain the court by giving the peremptory instruction failed to entertain. It is contended that the notes sued on were materially altered after signature by certain of the makers, by the addition of other parties thereto. But such a defense is not even remotely hinted at in the answer. It is stated that the court failed to give credit for payments, one made before the note was given, the other three all since the suit was brought. Clearly, however, the first could not have been a payment on this note and equally clear is that in the absence of the proper plea these last were not matters

for consideration. Even if, contrary to the current of authority, it be said that the Code System permits proof of payments, under the general issues, it is clear that such proof is restricted to payments before and not after suit. *Glascock v. Ashman*, 52 Cal. 495; *Hegler v. Eddy*, 53 Cal. 597. These latter must be set up by answer in the nature of a plea *puis darrein* continuance. The universal rule is stated in Phillips on Code Pleadings, Sec. 363, where it is said: 'Payments made pending the action can be asserted only as new matter and by means of supplemental pleading.'

Some reference is made to the payment of \$1,000 alleged to have been made between the execution of the note and the filing of the suit, but aside from the matter of the absentee of any answer setting up such payment we discover in the record no testimony that would have justified a finding that such payment was made."

*Transcript, page 286-287.*

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## SCHMIDT *v.* BANK OF COMMERCE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 281. Argued March 19, 1914.—Decided May 25, 1914.

This court accepts the rulings of the territorial courts on local questions of pleading and practice. *Santa Fe Ry. Co. v. Friday*, 232 U. S. 694. Where some of the signatures of defendant makers had been obtained by means of fraudulent representations by the plaintiff holder of the paper, the whole transaction is vitiated even as to those makers

who were liable on former existing paper of which that in suit was a renewal.

Where a renewal note constitutes a new promise with distinct legal consequences, it cannot be enforced if fraudulently induced, even if there were no defense to the older note in renewal of which it is given.

Under the Negotiable Instrument Act of 1907 of New Mexico, the title of a person negotiating commercial paper is defective if any signature thereto has been obtained by fraud, and if any one person is relieved from liability by proof of fraudulent inducement, all other persons who signed the paper are likewise relieved although they did not participate in and were ignorant of such fraud.

Where the court, on plaintiffs' motion, has denied the right of defendants to show that the note sued on was void as to them because of subsequent alteration by addition of signatures of other co-makers, the plaintiff cannot defeat defendants' defense of fraud in obtaining the later signatures on the ground that the notes were completed instruments and binding upon the makers before the others had signed.

16 New Mex. 414, reversed.

THE facts, which involve the effect of fraudulent inducement to make commercial paper and the rights of co-makers to be relieved of liability in such case, are stated in the opinion.

*Mr. Francis E. Wood*, with whom *Mr. O. N. Marron* was on the brief, for plaintiffs in error.

*Mr. Harry M. Dougherty*, with whom *Mr. James G. Fitch* was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought by the Bank of Commerce in the District Court for Socorro County in the Territory of New Mexico to recover upon two promissory notes. The plaintiff bank was the payee and the defendants Broyles, Schmidt & Story, Crossman, Brown, Pratt (alias Anderson), Lewis and Evans, were the makers. Broyles de-

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faulted; the other defendants answered, alleging in substance that they had signed the notes for Broyles' accommodation and had been induced to sign by the fraudulent representations of the bank. Upon the trial, the motion of the plaintiff for a direction of a verdict was granted as against all the defendants except Lewis, and as to him the plaintiff was permitted to take a non-suit. The judgment on the verdict was affirmed by the Supreme Court of the Territory. 16 New Mex. 414.

Several questions of pleading and practice are presented, but in view of their local character we accept, as to these, the rulings of the territorial court. *Phoenix Rwy. Co. v. Landis*, 231 U. S. 578; *Work v. United Globe Mines*, 231 U. S. 595; *Santa Fe Rwy. Co. v. Friday*, 232 U. S. 694. We shall therefore assume that the complaint was sufficient; and that the defenses of alteration, the unauthorized filling of blanks, and the failure to credit certain payments, were not available because not suitably pleaded. The Supreme Court of the Territory also held that although both parties had requested peremptory instructions, the defendants were entitled, upon the denial of their motion, to ask that the case be submitted to the jury and that this request was properly made. See *Empire State Company v. Atchison Company*, 210 U. S. 1.

The question before us then is whether, in view of the state of the evidence upon the defense that the notes were procured by fraud, the trial court erred in directing a verdict for the plaintiff. It is apparent that there was evidence sufficient to go to the jury that the signatures of some of the defendants had been obtained by means of fraudulent representations. Upon this point, the Supreme Court of the Territory said, p. 423: "The defense, as we have seen, was principally that the signing of the notes was procured by fraud. There was undoubtedly evidence that the defendants Anderson" (impleaded as Pratt), "Evans, Brown and Lewis were told by plaintiff's repre-

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sentative prior to signing the notes that Broyles was solvent and were further told that plaintiff had ample collateral for the notes, and there was also evidence from which the jury might have concluded that the defendants signed the notes in reliance upon these representations. We find also upon the record room for a conclusion by the jury that these statements were untrue and that they were known when made to be untrue. Indeed the trial court recognized this, for as to Lewis, in whose favor the testimony on this point was no stronger than on behalf of Anderson, Evans and Brown, the court held that the matter was one for the jury." Notwithstanding this estimate of the evidence, the court sustained the recovery against the last named defendants holding that as they were liable upon former notes for the same amount, which were renewed by the notes in suit, the defense was not available. It was said that, even assuming the notes in suit to have been given 'as the result of a wilful misrepresentation,' the defendants being bound by the former notes were 'held to no greater duty than previously rested upon them' and hence could not defend upon the ground that they were induced to sign the notes by fraudulent representations.

We are unable to agree with this conclusion. The question was not one of a recovery of damages in deceit. *Ming v. Woolfolk*, 116 U. S. 599, 602, 603. If there was fraud, it vitiated the transaction and the plaintiff could not avail itself of its own wrong by enforcing the notes. The fact that the three defendants, Anderson, Evans and Brown, were liable on the former notes did not place them under any legal obligation whatever to make the notes in suit. It appeared that the former notes were signed by Broyles, Anderson, Evans and Brown; the last three being in effect sureties for Broyles; and as the court states, 'upon the giving of the present notes, these former notes were surrendered by plaintiff bank and destroyed.' On the new notes Lewis, Schmidt & Story and Crossman were addi-

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tional makers and in effect new co-sureties. Not only was there new paper but the legal position of Anderson, Evans and Brown was materially changed. Broyles was discharged from liability on the old notes and, with respect to the new, there were six (treating the firm of Schmidt & Story as one) in the position of co-sureties instead of three. No one of the three defendants in question who were parties to the original paper could pay it and hold the other two to their original measure of contribution. The new notes constituted new promises with distinct legal consequences. It is clear that the plaintiff could not enforce them if they were fraudulently induced.

There was no evidence of fraudulent representations to the defendants Schmidt & Story and Crossman, but they contend that they are not bound if their co-makers were relieved from liability by reason of the plaintiff's fraud. Reference is made to § 55 of the Negotiable Instruments Act, Laws of 1907 (New Mexico), c. 83, which provides: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." It has been held by the Supreme Court of Wisconsin, in construing the same language in the Wisconsin act, that if one of the signatures of several co-makers is obtained by fraud, the defense is also available to the other makers since the equality of burden is disturbed. *Hodge v. Smith*, 130 Wisconsin, 326; *Aukland v. Arnold*, 131 Wisconsin, 64, 66, 67. In the case last cited the court said, referring to *Hodge v. Smith, supra*: "It was there held that the title of a person who negotiates commercial paper is defective when he has obtained any signature thereto by fraud, and that if the party so defrauded be relieved from liability thereon, then such fraud makes such paper void-

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able by all the other persons who signed it, though they did not participate in and were ignorant of such fraudulent conduct at the time they signed it. This conclusion was reached upon the ground that, when several persons assume such an obligation, it is material and important that all who join as makers should share equally in bearing the burden of its payment, and if, through the fraud of the person holding it, such equality of burden is disturbed and the burden increased as to some of the persons signing it, such fraud renders the title defective as to all of the persons who signed it." While this construction of the statute was apparently accepted, it was held that the defense was not open to Schmidt & Story and Crossman for the reason that they signed the notes several days before the signatures of the other defendants upon whom the fraud was practiced were obtained and that there was no evidence in the record 'as to whether the defendants Schmidt, Story and Crossman or any of them had any knowledge that there were to be any other signers than themselves.' Accordingly, it was said that so far as the record showed the notes were 'complete and binding obligations' upon these defendants at the time they executed the same and that fraud in obtaining the signatures of the subsequent co-signers would not affect the equality of the burden they had assumed.

This, as it seems to us, is not an adequate answer to the defendants' contention. It is true that these defendants have endeavored to maintain that the notes were altered by the addition of the other signatures, relying upon Negotiable Instruments Law, § 125. See Daniel, *Negot. Inst.*, § 1387. But the Supreme Court of the Territory ruled that under the pleadings this defense was not available and could not be considered. The plaintiff could not maintain this position and at the same time defeat the defense of fraud upon the ground that the notes were complete instruments, and as such had become the binding

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obligations of these defendants, before the others signed. Taking the notes as they stood upon the pleadings and proof, we think that these defendants (Schmidt & Story and Crossman) must be regarded as co-makers with the other defendants, to whom the representations are said to have been made, and it follows that if any of the signatures of these co-makers were obtained by fraud the equality of burden was altered. The plaintiff's fraud, assuming it to have been committed, changed the legal effect of the promise of these defendants. For these reasons we think that they were entitled to have the evidence as to fraudulent representation submitted to the jury and that the direction of the verdict in favor of the plaintiff was error.

*The judgment is reversed and the case is remanded to the Supreme Court of the State of New Mexico for further proceedings not inconsistent with this opinion. It is so ordered.*

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